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AND IN

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re LEAVESLEY (A PERSON OF UNSOUND MIND, DECEASED).

C. A.
1891
Jan. 12, 26.

*Lunatic—Judgment Creditors of—Charging Orders—Fund in Court—Death of Lunatic—Validity of Charging Orders—*1 & 2 *Vict. c.* 110, *s.* 14 [*Revised Ed. Statutes, vol. viii., p.* 371]—3 & 4 *Vict. c.* 82, *s.* 1 [*Revised Ed. Statutes, vol. viii., p.* 630].

The effect of a charging order made by a Judge in favour of a judgment creditor under 1 & 2 Vict. c. 110, does not depend upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment; and the 14th section of that Act, and the proviso in the 1st section of 3 & 4 Vict. c. 82, must be read as meaning that the judgment creditor is to have the same remedies, and the order of the Judge the same effect, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor.

Creditors of a lunatic, whose debts were incurred before the lunacy, after the lunacy obtained judgments against him, and also orders charging a fund in Court in the lunacy with the amounts of their respective judgments, which orders were not in terms enforceable until the death of the lunatic or further order.

The lunatic died insolvent, and upon an application by his administratrix for payment out of the fund:—

Held, that the charging orders were valid and effective, and that the judgment creditors were entitled to be paid the several amounts due thereon respectively out of the fund before transfer of any part thereof to the administratrix.

SUMMONS IN LUNACY.

This was an application by the administratrix of the above-named lunatic, asking that a sum of £493 14*s.* 3*d.* New Consols in Court to the credit of this matter might be sold, and the

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proceeds, together with any cash or dividends to the like credit, might be paid to her to be applied in a due course of administration.

This sum of £493 14*s.* 3*d.* New Consols represented the net proceeds of a sale made in December, 1887, under an order in the lunacy, of the furniture, fittings, stock-in-trade, and goodwill of the business formerly carried on by the lunatic; and, together with a small sum of cash, it constituted the whole of the lunatic's estate.

The lunatic died on the 20th of April, 1890, and his debts at the time of his death amounted to £647 13*s.* 5*d.* Of this sum £228 15*s.* was owing to four judgment creditors of the lunatic, who were ordinary trade creditors of his before he was found a lunatic, and who, after he had been so found, brought actions against him, recovered judgments, and between September, 1889, and February, 1890, obtained orders charging the fund in Court with the amount of their judgment debts. The four charging orders were in similar form, and each of them contained a charge on the fund for the amount of the judgment debt, and interest from the day it was entered up, and costs; with a proviso that such charge was not to be enforceable until the death of the lunatic or until further order, and a direction that the solicitors then acting for the lunatic should on his death give notice of his decease to the creditors in whose favour the charging orders were made. It appeared that the interests of the lunatic had been looked after by the official solicitor, who upon investigation had ascertained that the debts were due and the judgments properly obtained under the Rules of the Supreme Court.

The judgment creditors who had obtained these charging orders now claimed payment out of the fund in Court of the amounts comprised in their respective charges; and the question was whether they had a prior right to the extent of their orders, or whether the Court should transfer the fund to the administratrix.

R. F. Norton, for the administratrix :—

These charging orders are altogether nugatory. I admit that

there is jurisdiction to make charging orders on funds in Lunacy: *Horne* v. *Pountain* (1). But they are nugatory when made. By 1 & 2 Vict. c. 110, s. 14, a judgment creditor who obtains an order charging the stock of his creditor is entitled thereunder to the same remedies as if the charge had been made by the debtor himself; and by 3 & 4 Vict. c. 82, s. 1, no charging order made by any Judge is to have any greater effect than if the debtor himself had charged the stock in favour of the judgment creditor. So a judgment creditor can only have through a charging order a valid charge to the extent to which his debtor could have given him one by contract or agreement. But here, at the time these charging orders were made, the judgment debtor was a lunatic and incapable of giving any valid charge. The charging orders made under these circumstances can, therefore, have no validity, and the creditors who obtained them have no priority. As to *Horne* v. *Pountain*, I have looked at the orders made in the matter of *Pountain's* lunacy subsequent to the decision in the Queen's Bench Division, and I find that the Lords Justices refused to make any order for payment to the judgment creditor; and they could only have taken that course upon the footing that the charging order was nugatory. The creditors should have gone to the Court in Lunacy to enforce their claims against the lunatic: *In re Pink* (2); the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), ss. 116 and 117. At all events, the orders are bad in point of form; they were not to be enforceable until after the death of the lunatic, and the Court had no jurisdiction to make a reversionary order.

D. L. Alexander, for one of the judgment creditors who had obtained a charging order:—

In an application against a living lunatic, the first thing the Court considers is the maintenance and protection of the lunatic. In this case there is no further necessity for maintaining or protecting the lunatic; and if the charging orders are good, the Court will give effect to them. There is no suggestion that they were improperly obtained, and the debts in respect of which they were given were all trade debts incurred, before any order was

(1) 23 Q. B. D. 264. (2) 23 Ch. D. 577.

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made in the lunacy, for goods supplied to the deceased for the purposes of his business. It is said that these orders are bad because, according to the language of the Acts, the creditor is to have, by virtue thereof, the same remedies which he would have had if a charge "had been made in his favour by the judgment debtor," and no order is to have any greater effect than a charge so made. But the words relied on in support of this argument are only used to define the extent of the charge when it has been made. The charge derives its operation and effect, not from any contract or agreement made by the judgment creditor, but from the order made by the Judge; and the words in question must be read as meaning a valid charge made by the judgment debtor, and not as meaning a charge which is no charge at all. If the debt on which the judgment and charging order was founded had been void, the charging order would have been inoperative: *In re Onslow's Trusts* (1). But that is not the case here, and our charging orders are perfectly good. They amount to equitable execution, and we are in the same position as though, in a case where such a course would have been open to us, we had obtained the appointment of a receiver, or a valid charge under the hand of the debtor. The fund in Court must accordingly be applied in payment of our claims before any part of it is transferred to the administratrix; and *Horne* v. *Pountain* (2) is a direct authority in our favour.

R. F. Norton, in reply.

Jan. 26. LINDLEY, L.J. (after stating the facts, continued):—

The judgment creditors, having obtained these charging orders, ask for payment to them direct of the amounts due to them upon their respective judgments; and the question is whether they are entitled to an order to that effect, or whether we ought to hand the whole of this money over to the legal personal representative of the lunatic. That depends on the effect of 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1; and a doubt has arisen in consequence of the language there used, to which I will now refer.

(1) Law Rep. 20 Eq. 677. (2) 23 Q. B. D. 264.

The Act 1 & 2 Vict. c. 110 was passed, among other things, for abolishing arrest on mesne process in civil actions, except in certain cases; and for amending the remedies of creditors against the property of debtors, and other things. On the one hand, it took away the remedy by arrest on mesne process, and on the other hand it extended the remedies of the creditors. The object is apparent from the preamble of sect. 11, the first of the series of sections from 11 to 15, which extend the remedies of the creditors. Sect. 11 extends the remedies as to land; sect. 12, as to money, bank-notes, cheques, bills, and promissory notes; and sect. 13 makes the judgment, when recovered, operate as a charge on real estate. The language of that section is extremely important with reference to this case, for the language is that the judgment is to have the same effect as if the person against whom the judgment shall have been entered up had power to charge the hereditaments, and had agreed to charge the same. Sect. 14 relates to stocks and shares which may be charged by a Judge's order, where the language is a little varied; and sect. 1 of 3 & 4 Vict. c. 82, extends sect. 14 of the former Act to money in Court, and to other moneys to which it was supposed sect. 14 did not apply. The object of these enactments was to extend the remedies of judgment creditors against judgment debtors, and the enactments are general in their terms, and apply to all judgment creditors and all judgment debtors.

As regards lands charged under the Act, it is expressly said (1 & 2 Vict. c. 110, s. 13) that a judgment creditor shall have the same remedies in a Court of Equity as he would be entitled to in case the judgment debtor had power to charge the lands, and had by writing agreed to charge the same. Under this section a judgment against a lunatic would (if registered under sect. 19) clearly charge his lands. When dealing with stocks and shares, or money in Court, the clear language used in sect. 13 is altered. Under sect. 14 a charging order entitles the judgment creditor who obtains it to such remedies as he would have been entitled to "if such charge had been made in his favour by the judgment debtor." Under 3 & 4 Vict. c. 82, s. 1, the charging order is to have no greater effect than if the debtor "had charged such stock . . . in favour of the judgment creditor."

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The language in these sections is not so clear as that employed in sect. 13, and may be read in one of two ways—namely, as if the debtor had power to charge and had charged the stock, &c., or as if the debtor had given such a charge, if any, on the stock, &c., as he was capable of giving. To adopt the last construction would be to make the effect of a charging order depend, not on the validity of the judgment, but on the capacity of the judgment debtor, and would introduce a distinction between the power of a judgment creditor to reach the lands and his power to reach the stock of his debtor. There is nothing except an ambiguity of language to warrant such distinction; there is no trace of any intention to make such a distinction, nor is there any reason for making it.

The other construction—that is, that the charging order is to have the same effect as if the debtor had power to charge, and had agreed to charge, the stock, &c.—is the one which is most in accordance with the intention of the Legislature, as declared in the Act itself. This construction introduces no unreasonable distinctions between one class of property and another; and it is at least as much in accordance with the words as the rival construction which the Court is asked to adopt, but which, for the reasons I have given, I reject.

If words in a statute are ambiguous, and are capable of two constructions, that construction ought to be preferred which best carries into effect the object of the Legislature, and best conforms with the rest of the statute.

The truth is that the phrase, "as if the debtor had agreed to charge," is only a method of expressing that the charging order is to affect the debtor's beneficial interest in the properties charged, but nothing more: see *Scott* v. *Lord Hastings* (1). The words define the extent and priority of the charge, but have no reference to the capacity of the judgment debtor. His capacity ceases to be material when judgment has been properly obtained against him.

Even apart from authority, therefore, I should decide this case in favour of the judgment creditors of the lunatic; but the construction I hold to be correct has already been adopted by the

(1) 4 K. & J. 633.

Courts. The point was carefully considered in *Horne* v. *Pountain* (1), in which the judgment debtor was a lunatic; and the same construction was put on the statute as long ago as 1854, in *Watts* v. *Porter* (2), where Lord *Campbell* said that the word "honestly" could not be read into the statute, but the words "validly and effectually" ought to be implied. This construction is quite consistent with the decision of *Hall*, V.C., in *In re Onslow's Trusts* (3), for that decision proceeded on the ground that the judgment, which was the basis of the charging order, was itself invalid.

The charging orders made in this case are so worded as not to be enforceable until the death of the lunatic, or until further order; and, the lunatic being dead, it is unnecessary to consider what it would have been right for this Court to have done if the order had been in the ordinary form, and the judgment creditors had applied to this Court for payment during the life of the lunatic.

In this case the proper order will be to pay to the judgment creditors the amounts due to them respectively, such amounts to be verified by affidavit, and to pay the residue to the legal personal representative of the lunatic. The costs of the judgment creditors will be added to their respective debts, and be paid accordingly. This Court does not administer the assets of a deceased lunatic; but the moneys charged are, to the extent of the charging orders, not assets of the lunatic to be administered by his legal personal representative, but are to that extent withdrawn from such assets, and ought to be paid direct to the judgment creditors who have obtained charging orders. The legal personal representative of the lunatic is a trustee for such creditors, and the Court can therefore properly pay them at once.

KAY, L.J.:—

The question in this case depends upon the true construction of sect. 14 of 1 & 2 Vict. c. 110, and sect. 1 of 3 & 4 Vict. c. 82.

Previously to these statutes Government stock and shares in

(1) 23 Q. B. D. 264. (2) 3 E. & B. 743, 750.
(3) Law Rep. 20 Eq. 677.

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public companies could not have been reached by the ordinary process of execution. The former statute provided that, if any judgment debtor had such stock or shares in his own name or in the name of a trustee for him, a Judge of the High Court, on the application of the judgment creditor, might order them to stand charged with the judgment debt and interest, "and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." The statute 3 & 4 Vict. c. 82, s. 1, extended these provisions to the interest of any judgment debtor in stocks or shares standing in the name of the Accountant-General, provided that no order of any Judge "shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

It is suggested on behalf of the administratrix that any attempt by the lunatic to make such a charge would have been invalid, and that the meaning of this legislation is only to give a charge where the judgment debtor had capacity to have made a like charge by agreement, and accordingly that the charging orders in this case are entirely void, because the lunatic was incapable of so agreeing.

On the other hand, it is urged that the words relied on are only used in the Acts to define the extent of the charge when made; that such charge derives it efficiency, not from any agreement of the judgment debtor, but from the order of the Judge, and that the words must be read as referring to a valid charge made by the judgment debtor in those passages which I have quoted from the Acts.

In construing Acts of Parliament it is always well to bear in mind the rules of interpretation adopted in *Heydon's Case* (1), where it is said in effect that four things are to be considered, viz., what was the law before the Act—what was the mischief and defect for which such law did not provide; next, the remedy and the true reason of the remedy; and then, "the office of all the Judges is always to make such construction as shall suppres s

(1) 3 Rep. 7 b.

the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*."

In *Hawkins* v. *Gathercole* (1), *Turner*, L.J., after referring to some other old cases on the interpretation of statutes, says: "We have therefore to consider, not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light on the subject."

The language of the former of these two statutes does not seem to me to occasion much difficulty. "Such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." In this sentence "such order" is the order made by the Judge whose power to make the charge in favour of a judgment creditor is not limited in any way. "Such order" is therefore a valid and effective charging order made by the Judge, and the subsequent words, "as if such charge" had been made by the judgment debtor, must, I think, necessarily mean as if he had made a valid charge to the same effect. Upon that statute I should conclude without hesitation that the true construction was what I have indicated.

The language of the later Act, 3 & 4 Vict. c. 82, which applies to this case, is not so easy to deal with. There the words to be construed are in a proviso, and are in a negative form, and are plainly a restriction upon the effect of the Judge's order. "Provided" that no order of any Judge shall have any greater effect "than if such debtor had charged" the stock, &c. The reading which the argument would have us give in this case is, "than if such debtor had attempted to charge." I am inclined to think that this construction alters the words of the Act more than the construction contended for by the other side. "If such debtor had charged" means, in my opinion,

(1) 6 D. M. & G. 1, 22.

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not if he had made an invalid attempt to charge, but if he had made an effective charge. For the word "debtor" substitute "lunatic debtor," which I think, as lunatics may be judgment debtors, it is proper to do. "If the lunatic debtor had charged" in such a sentence must mean if he had effectively charged.

Assuming that the former statute enabled a charging order to be made against stock and shares of a lunatic not standing in the name of the Paymaster-General, it is impossible to suppose that this later statute, which was plainly intended to extend the provisions of the former to stock and shares standing in the Paymaster-General's name, should be ineffective in the case of a lunatic.

I suppose there can be no doubt that if the lunatic had been possessed of chattels—as if his furniture in this case had not been sold—they might have been seized under the process of execution by *fi. fa.*, or if he had owned land it might have been taken under an *elegit*. Notwithstanding his lunacy he had been put—as was competent by the law of this country—in the position of a judgment debtor, and the legal consequences of that would follow as a matter of course, subject always to such control over their exercise as might be possessed by the Court in Lunacy.

The main object and purpose of the statutes I have referred to was to enable a judgment creditor to obtain a charge upon certain property of his debtor which he could not reach by the ordinary means of a *fi. fa.* or *elegit*. There is no reason that I can imagine why this remedy should not exist in the case of every person against whom a judgment could be obtained, and, indeed, an express exemption of a lunatic judgment debtor would, it seems to me, be a great hardship upon the creditor, who might have enforced his judgment, as I have pointed out, against either chattels or land of the lunatic if he had possessed any.

This construction does not make the words in the statutes which I have been considering ineffective. The judgment of *Erle*, J., in *Watts* v. *Porter* (1), is now accepted as an accurate explanation of the meaning of these clauses. Their object is to

(1) 3 E. & B. 743.

confine the charge to such as the debtor could honestly have made—that is, to make it subject to every previous equitable charge upon the fund, and to put the creditor who obtained a charging order precisely in the position of an ordinary execution creditor, as defined in *Whitworth* v. *Gaugain* (1); but all the Judges seem to have agreed that, as Lord *Campbell* expresses it (2): "The words, that are to be understood as implied by the Legislature, we think, are 'validly and effectually.'" The erroneous view taken by the majority of the Court was that a prior equitable incumbrancer, not having given notice to the trustees, had not completed his title against the judgment creditor—a decision which has since been overruled: *Beavan* v. *Earl of Oxford* (3); *Kinderley* v. *Jervis* (4); *Pickering* v. *Ilfracombe Railway Company* (5); *Scott* v. *Lord Hastings* (6).

Turning to the authorities, there is one decision of two experienced Judges directly in point.

In *Horne* v. *Pountain* (7), a similar charging order was made on funds of a lunatic standing in the name of the Paymaster-General, but limited to so much of the fund as the Lords Justices sitting in Lunacy might deem applicable. The case came before Mr. Justice *Field* and Mr. Justice *Cave* on an application by the judgment creditor to have the order made unconditional. It was argued that, by reason of the words of the statute which I have read, no order could be made. Neither of the learned Judges deals expressly with this argument; but Mr. Justice *Field* says (8): "Our duty is to give effect to the Act. I find in it no exception, nor anything pointing to any distinction between a sane person or a lunatic"; and the order was made absolute in form, the condition being struck out. The judgment and charging order were both obtained after the debtor had been found lunatic.

This is a direct decision in favour of the claim of the judgment creditors in the present case.

In *In re Onslow's Trusts* (9), a judgment was obtained by default

(1) 1 Ph. 728.
(2) 3 E. & B. 750.
(3) 6 D. M. & G. 492.
(4) 22 Beav. 1.
(5) Law Rep. 3 C. P. 235.
(6) 4 K. & J. 633.
(7) 23 Q. B. D. 264.
(8) Ibid. 269.
(9) Law Rep. 20 Eq. 677.

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against a man who was of full age for money lent to him while an infant, and a charging order was made upon that judgment. The fund charged was in Court, and three incumbrancers upon it, whose charges were undisputed, applied for payment, alleging that the charging order was invalid by the effect of the *Infants Relief Act*, 1874, which made an infant's contract for money lent absolutely void. *Hall*, V.C., decided against the charging order, not on the ground of a want of capacity by the defendant to make a charge, for the judgment and charging order were both obtained after the defendant was of full age, but because, if he had made such a charge by agreement, it would have been invalid for want of consideration. This decision is that a charging order cannot be obtained upon a judgment for a debt which was not due. The Vice-Chancellor did not accept the judgment as conclusive evidence of the debt, because it was a judgment which had been obtained against the defendant upon a claim for money lent to him during his infancy, which by the *Infants Relief Act*, 1874, could not be recovered. It was argued that the Court should follow the decision in *Ex parte Kibble* (1), where on an attempt to make the same person a bankrupt the Court examined the judgment and treated it as invalid.

For the reasons I have given I am of opinion that the charging orders in this case are valid and effective. The consequence is that, to the extent of such charging orders, the fund does not belong to the estate of the lunatic; if it did we should simply order the transfer of the fund to the legal personal representative, leaving him to administer it; but as it does not, we must direct the amount due on the several charging orders, which must be verified in each case by affidavit, with their costs of this proceeding, to be paid to the judgment creditors, and the rest of the fund to be transferred to the legal personal representative.

Solicitors: *Ridsdale & Son; Emanuel & Simmonds.*

(1) Law Rep. 10 Ch. 373.

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[1865 V. 3.]

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Will—Trust—Settled Land—Annuitant—Tenant for Life—Surplus Income—Capital Money—"Improvements"—Improvement of Landed Estate—Maintaining Houses in good habitable repair—Building Houses—Accumulation—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98) [*Revised Ed. Statutes, vol. iii., p.* 600]—*Settled Land Act*, 1882, *ss.* 2 (*sub-ss.* 5, 8), 25, 26, 58 (*sub-s.* 5).

A testator directed his trustees to invest his residuary moneys, together with all accumulations, in the purchase of a landed estate, and that out of the income thereof an annuity should be paid to his nephew for life, and that the surplus income should from time to time during the life of the nephew be expended in the purchase of additional land, "or in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property": and that, on the death of the nephew, his son (if any) should have a life interest in the whole of the landed property, subject to one-third of the yearly rental being expended year by year in improving, keeping up, or extending the estate; with remainder to the male heir of his nephew in succession for ever.

The testator died in 1865. His nephew survived him and had a son, an infant. Shortly after the testator's death an action was commenced for the administration of his estate, and a receiver was appointed. Subsequently the trustees purchased out of money in Court, representing the testator's residuary estate, a freehold estate, which was conveyed to them upon the trusts of the will. Under an order made in the action the income of the testator's estate, after keeping down the annuity to the nephew and providing for repairs, was, during twenty-one years from the testator's death, invested and accumulated. Upon the expiration of the twenty-one years a further order was made directing the receiver, after keeping down the annuity "and maintaining in good habitable repair the houses and tenements on the property," to divide the residue of the income, as from the expiration of the twenty-one years, among the testator's next of kin; whereupon the receiver applied part of the income of the landed estate, after keeping down the nephew's annuity, in repairs and "improvements" on the estate. The question was then raised, on a summons by the next of kin, whether the trust or direction in the will to expend surplus income in improvements was not, though indirectly, a trust or direction for "accumulation," and therefore void, under the *Thellusson Act*, after the expiration of twenty-one years from the testator's death; and thus whether the expenditure by the receiver for such purposes was valid:—

Held, by *Chitty*, J., that the trust or direction, being in the nature of a discretionary trust to apply, in due course of administration, a portion of the income for the purpose of improving the property, did not fall within

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the *Thellusson Act*, and was therefore good; and accordingly the order made on the summons declared "that the trust for improvement and maintenance contained in the will was valid, notwithstanding the expiration of twenty-one years from the testator's death." On appeal that order was affirmed, but with an addition that the declaration "was not to authorize the application of income to purposes the expense of which ought to be defrayed out of capital"; the trustees thus having power to apply to the Court for direction in case of difficulty.

Per Chitty, J.: The distinction between a trust to improve land and to purchase land is well settled: under the former you cannot buy land; under the latter you cannot improve land, although you may build a new house, which is regarded as acquiring land: *Drake* v. *Trefusis* (1).

Per the Court of Appeal: All improvements in substance, which could in any fair sense be regarded as coming under the words "maintaining in good habitable repair houses and tenements on the property," are outside the *Thellusson Act* altogether. Money laid out in building houses on the land would be within the Act.

EDWARD WARD WALTER RALEIGH, by his will, dated the 20th of April, 1864, appointed Sir *Edward Dering* and *Charles Vine* his executors and trustees, and directed that all property which he might bequeath in trust and which should not at the time of his death be invested in securities or funds of the British Government, in securities guaranteed by the English Government, in original East India Stock, or in the debentures of railways in *England*, should be transferred into such English securities, or be invested in freehold land or on mortgage of freehold land, as his trustees and executors might decide upon; and after bequeathing to his executors and trustees a sum of £20,000 in trust for his sister *Caroline Amesbury*, widow, and her children, as in the said will mentioned, and divers other legacies, he directed that the entire residue of his money or invested property should remain invested or should be invested in such English securities or funds as before mentioned, until such time as his trustees and executors could obtain a satisfactory investment in a compact freehold landed estate in *England*; and he directed that "all the residue of my invested or moneyed property, after having provided for the bequests aforenamed in this will, shall eventually, together with accumulations, be invested in such landed estate"; and he further directed that out of the interest derived on his property invested in funds or

(1) Law Rep. 10 Ch. 364.

in rental of land, the sum of £500 should be paid by half-yearly instalments of £250 each to his nephew *Edward Walter Raleigh* for his lifetime, and that "the surplus income accruing on such invested property over and above the annuity of £500 a year to my nephew, shall from time to time during his life be expended in the purchase of additional land, or in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property, and my said nephew shall be entitled to occupy as his personal residence any house which may be on the estate free of charge during his lifetime; should my said nephew *Edward Walter Raleigh* marry and at his death leave a son lawfully begotten and of sound mind, such son shall on the death of his father inherit a life interest in the whole of the landed property possessed under an engagement and stipulation that one-third part of the yearly rental (or the estimated yearly value of the one-third of the rental), shall be expended year by year in improving, keeping up, or extending the estate by the purchase of additional land, buildings, or the improvement of the land; and the property under similar engagements shall pass on to the lawful male heir of my nephew in succession for ever; should my nephew *Edward Walter Raleigh* die without legally begotten male issue, the property shall then pass, under precisely the same engagements and stipulations as laid down in the preceding paragraph with reference to succession and the application yearly of one-third part of the rental value to the improvement of the estate, to my nephew *Walter Raleigh Amesbury*, eldest son of my sister and the late *Joseph Amesbury*, Esq., and to his male heirs after him."

The testator died on the 22nd of January, 1865, and shortly afterwards this action was instituted for the administration of his estate, and a receiver was appointed. At the time of his death the testator had no landed property. In pursuance of the directions in the will the trustees, with the approval of the judge, purchased, out of funds in Court representing part of the residuary estate, a freehold estate near *Dartmouth*, and the same was duly conveyed to them upon the trusts of the will.

The nephew, *Edward Walter Raleigh*, was married, and the Defendant *Walter Frederick Carew Raleigh*, who was an infant,

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was his eldest son. Neither of them resided on the estate that had been purchased by the trustees of the will.

Under an order of the Court made in the action the residue of the income of the testator's estate, after keeping down the £500 annuity to *Edward Walter Raleigh* (who had been made Plaintiff in the action by revivor), and expending necessary sums in repairs, was, during twenty-one years from the testator's death, invested and accumulated. Most of the accumulations had since been invested in the purchase of property adjoining the freehold estate above mentioned. Upon the expiration of the twenty-one years the then trustees of the will applied to the Court by petition for directions as to the future disposition of the income; and by an order made on that petition, and dated the 11th of March, 1886, it was ordered that the receiver should, after keeping down the £500 annuity to the Plaintiff, *Edward Walter Raleigh*, "and after maintaining in good habitable repair the houses and tenements on the property subject to the trusts of the said will, divide the residue of the balances which shall from time to time be certified to be due from him, as from the 22nd of January, 1886"—the date of the expiration of the twenty-one years from the testator's death—"during the life of the said Plaintiff, or until further order, into two equal moieties." And it was ordered that the receiver should, "after payment of legacy duty on the income of the testator's estate, pay one moiety to the plaintiff, *Edward Walter Raleigh*, one of the next of kin of the testator, and the other to the defendant, *Octavia Alexander* . . . and the defendant, *Jane Dorothea Curtis* . . . as the executrixes of the late defendant, *Caroline Amesbury*, who was the other next of kin of the said testator." And it was declared "that nothing in this order contained is to sanction a larger expenditure by the said receiver in maintaining the said houses and tenements as aforesaid than the sum of £400 a year."

From time to time, after the expiration of the twenty-one years, the receiver, purporting to act in pursuance of the last-mentioned order and of the directions in the will, expended, beyond the £400 a year, many sums of money, amounting altogether to £1600, out of surplus income of the testator's real estate remaining after keeping down *E. W. Raleigh's* annuity,

in repairing and improving or otherwise in keeping up and maintaining the real estate; and those payments were from time to time allowed in the receiver's accounts, being thus deducted from the shares of income to which the said *Edward Walter Raleigh* and the said *Octavia Alexander* and *Jane D. Curtis* had been held to be entitled.

Among the items of the expenditure of the £1600 by the receiver were (1.) planting fruit trees, (2.) laying down pasture, (3.) purchase of the fixtures in a public-house on the estate, (4.) new buildings, and (5.) laying on water to a particular place.

The question then arose whether the directions in the will to apply surplus income in improvements did not transgress the *Thellusson Act* (39 & 40 Geo. 3, c. 98), as amounting, though indirectly, to a trust for accumulation, so as to render the above items of expenditure invalid.

On the part of the testator's next of kin, it was contended that those directions were void under the Act after the expiration of twenty-one years from his death, and that therefore the £1600 ought to be recouped out of the fund in Court, since the receiver's accounts had been closed and could not now be reopened. In order to raise the question for decision, the said *Octavia Alexander* and *Jane D. Curtis*, as the legal personal representatives of *Caroline Amesbury*, deceased, took out a summons asking that so much of the funds remaining in Court as would raise the said sum of £1600 might be sold, and that one moiety thereof might be paid to them and the other moiety to the said *E. W. Raleigh*; or in the alternative that an inquiry might be made as to which or what parts of the several sums making up the said sum of £1600 represented or consisted of moneys expended by the receiver for or in connection with repairs or improvements to the testator's real estate of a lasting or permanent character, or otherwise for the maintenance of such estate, and not being moneys liable to be paid by the tenant for life thereof; and that the Applicants might have liberty to apply for payment out of the fund in Court to themselves and to *E. W. Raleigh*, of what should be found on answering the inquiry to have been expended by the receiver, and for consequential directions.

This summons was adjourned into Court, and came on for

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hearing before Mr. Justice *Chitty* on the 1st of November, 1890.

Yate Lee (*Romer*, Q.C., with him), in support of the summons:—

As improving the property adds to its value, what has been done amounts to an indirect accumulation, and is therefore bad under the *Thellusson Act*. If this power is good, a testator might direct the income of his property to be laid out in building houses on a strip of land by the seaside for any number of years, and this accumulation must be void as much as if he directed the income to be invested in the purchase of land.

[CHITTY, J., referred to *Drake* v. *Trefusis* (1), observing that the distinction between a trust to improve land and to purchase land was well settled: under the former you cannot buy land; under the latter you cannot improve land, although you may build a new house, which is regarded as acquiring land.]

Jason Smith, for *Walter Raleigh Amesbury*:—

Any direction for the application of rents in improving land so as to make it amount to a purchase of land might be bad; but this power has not that effect, and is only a power of management similar to that not unusually inserted in settlements (2), and although the value of the property may be increased, it is not an accumulation within the *Thellusson Act*: *Bassil* v. *Lister* (3).

S. Dickinson, for *W. F. C. Raleigh*.

C. E. E. Jenkins, for *Edward Walter Raleigh*.

Byrne, Q.C., and *Farwell*, for the trustees.

Yate Lee, in reply.

CHITTY, J.:—

The testator's will directed an accumulation of his property, including his personal estate, during the life of his nephew, to

(1) Law Rep. 10 Ch. 364.
(2) *Bythewood* and *Jarman's* Conveyancing, 4th Ed. vol. vi. p. 681.
(3) 9 Hare, 177.

whom he gave an annuity, and the trust for accumulation has been avoided by the *Thellusson Act* after the expiration of twenty-one years from the testator's death.

The real estate has been purchased pursuant to the trusts of the will, and the accumulation of the rents and profits of that estate ceased at the time I have referred to. There is a fund in Court representing capital which at some time or other is liable under the trusts of the will to be laid out in the purchase of land.

The effect of the *Thellusson Act* in the circumstances of this case was to avoid the accumulation in favour of the next of kin, because it was personal estate, and the next of kin, therefore, come in and take the income of the estate subject to any valid prior charges there may be on it by virtue of the will. They take this surplus income during the life of the annuitant.

This summons is really an attack on the receiver's accounts which have been passed. These accounts are only income accounts, and nothing else. He has, under directions from the Chief Clerk, had liberty from time to time to execute certain works the nature of which I will not now speak of. When his account was passed, all these questions were finally closed.

Mr. *Yate Lee* says that a note was made by the Chief Clerk at one time before the accounts were passed to the effect that this particular item relating to some works to be executed on the land was to be allowed without prejudice to the question whether it should be ultimately borne by income or capital. That was an expression of opinion on the part of the Chief Clerk which was erroneous.

The fund which remains in Court, and which is liable to be invested in land, must be invested in land, and it is not liable to be laid out in the improvement of land, except in cases where the improvement is the erection of buildings on the estate—in other words, that fund is liable to be dealt with only in accordance with the principle which has been finally settled in the case of *Drake* v. *Trefusis* (1). Consequently, if any application were made with regard to this capital fund to execute works upon the land that has been purchased, it would have to be considered

(1) Law Rep. 10 Ch. 364.

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whether the proposed works fell within the limit of the doctrine in *Drake* v. *Trefusis* (1); that is to say, whether the works amounted to the acquisition of new land. The only question, however, where it is proposed to deal with the income, is the propriety of the repairs or improvement under the circumstances of the case. I make these observations to shew that the considerations that apply to dealing with the capital fund are entirely different from those that relate to the income.

I think as to the past the matter is concluded by what has happened. The receiver's account has been finally settled; therefore there is an allowance out of income, and it would not be right to reopen the accounts for the purpose of seeing whether, consistently with the direction in *Drake* v. *Trefusis*, some part of the items, at the utmost some small part, should be applied towards the works that have been executed.

But I will not stay upon that point, nor rely upon it solely. I will take the argument that has been addressed to me with regard to the *Thellusson Act*. There is a trust in the will for the application of the income to the improvement of the landed estate, which means the landed estate purchased with the sanction of the Court, and maintaining in good habitable repair the houses and tenements on the property. It is argued that this trust was avoided by the *Thellusson Act*. It was also rather suggested than seriously argued that the trust as to maintaining the property in repair was within the *Thellusson Act*, and therefore void. It is sufficient for me to say there is no ground for that contention. No question arises as to the trust to lay out in the purchase of land the fund which has been accumulated during the period allowed by the *Thellusson Act*.

Now, with regard to the improvement of the landed estate the argument was this, that the direction was in substance a direction to accumulate. But the trust is not a trust of the whole income; it is a discretionary trust limited to the life of the annuitant. This is the first time during the ninety years that have elapsed since the *Thellusson Act* was passed that this point in its present form has ever been put before the Court. Mr. *Jason Smith* has pointed out what is very well known, namely, that there are in

(1) Law Rep. 10 Ch. 364.

many settlements to be found trusts during the life of the tenant for life containing various powers of management vested in trustees, including, among others, the improvement of the land, which is the subject-matter of the settlement, repairs, felling of timber, and the like, so that the tenant for life only takes from the trustees the surplus income. Such trusts as these must frequently have been in operation for a period of more than twenty-one years from the date of the settlement, or the will, or instrument creating the settlement. According to the argument addressed to me, the *Thellusson Act* would sweep away these trusts. The answer, as it seems to me, is that the *Thellusson Act* does not affect such trusts. Of course the Court will see that that which was directly prohibited is not allowed to be done in an indirect manner. But there is no analogy between a trust for accumulation and a trust such as this is, of a discretionary nature, to apply, of course properly, in the administration of the trusts a portion of the income for the purpose of improving the property. Some ingenious conveyancer might try to work through the medium of the trust for improvement so as, in fact, to make it an accumulation. But that is not this case. To some extent the question that is now raised before me was brought before *Turner*, L.J., when Vice-Chancellor, in *Bassil* v. *Lister* (1), and I entirely agree with the observations made at p. 184 upon the effect of the *Thellusson Act.*

This case, therefore, does not fall within the *Thellusson Act*, and I think both the trust for repairs and the trust for improvement in this will are good. The execution of the trusts of the will is now under the direction of the Court, obviously for the best of reasons, namely, that the next of kin are not disposed to allow more money to be laid out than they are obliged, because the estate may never come to them. The result is that the administration under the Court must go on in order to settle matters which are constantly arising as to what should be laid out in repairs and in improvements. The Court will take care that nothing is done under these trusts that in any sense can amount to an accumulation. I refuse the summons; the costs of all parties to come out of the income in the hands of the receiver.

(1) 9 Hare, 177.

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[The order, as drawn up, contained a declaration "that the trust for improvement and maintenance contained in the will is valid, notwithstanding the expiration of twenty-one years from the testator's death," and went on to direct taxation of costs of all parties, and payment of such taxed costs by the receiver out of any moneys in his hands.]

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Octavia Alexander and *Jane D. Curtis* appealed from that decision.

The appeal was heard on the 30th and 31st of January, 1891.

Haldane, Q.C., and *Yate Lee*, for the Appellants:—

We do not dispute that a trust to keep property in repair is not struck at by the *Thellusson Act*. But we say that the works to be done under it must be repairs in the proper sense of the term, not improvements made under colour of being repairs. To spend income in improving property is an accumulation of income.

Our view is that the receiver has been spending money year by year in improving capital property from which no one derives any immediate enjoyment, and that the case is covered by the *Thellusson Act* (39 & 40 Geo. 3, c. 98), which, we submit, includes any direction for accumulation even though not expressed in terms. That appears clear from the preamble, which shews that the Act is intended to deal with "all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed." And then the first section enacts that no person shall settle or dispose of any real or personal property, "so and in such manner that" the income shall be wholly or partially accumulated beyond (among other limits) twenty-one years after the decease of the settlor or testator. Then sect. 2 makes exceptions in cases of provisions for payment of debts, or raising portions, or of a direction as to the produce of timber. To bring a case within the Act it is not necessary for the testator to say, in so many words, "I direct my trustees to accumulate"; it is sufficient if he directs that to be done which, as a necessary consequence, leads

to an indefinite accumulation: *Tench* v. *Cheese* (1). Here the direction to accumulate is quite as "express" as it was in that case. A direction to accumulate may be implied from a direction at a future time either to invest in Consols, or to purchase real estate, or to erect a mansion-house, or to make improvements.

[KAY, L.J.:—*Drake* v. *Trefusis* (2) has decided that spending money in erecting new buildings on the settled property is the same thing as buying land; capital money directed to be invested in the purchase of land may be expended in building a new house on the settled land.]

There is a difference between putting property in proper repair and adding to its value.

[KAY, L.J.:—If a testator directed his land to be drained, would that be void?]

Yes, if the trustees expended more than a tenant for life would do in order to keep up his net income. Doing what is required to keep up the net income is nothing more than a legitimate development of the property.

[LINDLEY, L.J.:—You are losing sight of the important qualifying provision in the *Thellusson Act*, that the dispositions intended to be dealt with it are dispositions of estates "whereby the beneficial enjoyment thereof is postponed." Would the beneficial enjoyment in this case be postponed by improvements?]

The improvements here are such that *E. W. Raleigh* will get no immediate advantage from them; if any were effected in a house on the estate in which he resided, then he would.

[KAY, L.J.:—If the expenditure is such that the actual occupier gets some benefit from day to day, is that an accumulation within the Act?]

Under this will the income of the improvements goes to no person during his life, but is to be accumulated, so that there is no immediate beneficial enjoyment. *Bassil* v. *Lister* (3), which

(1) 6 D. M. & G. 453, 461, 463. (2) Law Rep. 10 Ch. 364.
(3) 9 Hare, 177.

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was relied on by the learned Judge below, has no real application to this case: the decision in that case proceeded on the footing that the sum payable by an insurance office on a life policy is payable under a contract of insurance to which the *Thellusson Act* does not apply, and that therefore a direction in a will for payment of the premiums of such a policy is not an accumulation within the Act. That is quite a different case from that of a direction such as we have here.

[KAY, L.J.:—Keeping up a policy is only one form of buying a future contingent benefit. Is not the same thing being done here?]

Our case is that money is being spent year by year for improving capital property of which no one has any immediate enjoyment. The trustees are directed to find and purchase a compact estate of which no one is to have the enjoyment so long as the annuitant, *E. W. Raleigh*, lives: then, upon his death, his son is to enjoy only two-thirds of the income, while the remaining third is to be expended in improvements and purchasing additional land.

[KAY, L.J.:—But that is while the son is in possession.]

Taking away one-third of a man's income and directing it to be applied in improvements—such as drainage, for instance—which postpone the beneficial enjoyment, is accumulation. In *Mathews* v. *Keble* (1), Lord Justice *Selwyn* says that even "repairs" are within the *Thellusson Act*. The test is this: we must shew that what has been done makes the *cumulus* larger; and that is the effect of the improvements.

[KAY, L.J.:—That is not enough: also you must shew that what is done postpones the enjoyment—that there is no immediate benefit to be derived from it.

LOPES, L.J.:—You must shew that it is a dry, unproductive *cumulus*.]

In *Shaw* v. *Rhodes* (2), a testator directed that, subject to certain annuities, the income of his estates should be accumulated until the death of the survivor of his children, and that on the

(1) Law Rep. 3 Ch. 691, 698. (2) 1 My. & Cr. 135.

death of such survivor the estates should stand charged with the payment of two-thirds of the produce, so as to create a fund for division among his grandchildren; and that charge was held to be a provision for accumulation within the Act. We submit that the five items upon which income has been spent are improvements of capital property of which no one has any immediate enjoyment, and are therefore within the Act.

[LOPES, L.J.:—They seem to me to amount to nothing more than an expenditure necessary for the proper management of the estate, and not to be within the *Thellusson Act* at all.]

Farwell, Q.C. (*Byrne*, Q.C., with him), for the trustees.

C. E. E. Jenkins, for the Plaintiff, *Edward Walter Raleigh*, and

S. Dickinson, for the Defendant *Walter F. C. Raleigh*, left the question to the Court.

[LINDLEY, L.J.:—Would it not be a convenient rule to say that any of the improvements specified in sect. 25 of the *Settled Land Act*, 1882, which the trustees might make out of capital moneys, they should make out of capital moneys rather than out of income?]

Farwell:—

It seems doubtful whether there are any persons qualified to exercise the powers under the *Settled Land Act*. The trustees cannot exercise them, for they have no power of sale, and therefore they are not trustees of the settlement within the definition in sub-sect. 8 of sect. 2. A person capable of exercising the powers as "tenant for life" must, under sub-sect. 5, be a tenant for life "entitled to possession." Here there is no such person. No doubt, under sect. 58, sub-sect. 5, a "tenant for the life of another" can exercise the powers of a tenant for life under the Act; but, according to sub-sect. 5 of sect. 2, the tenant for life must be entitled, as such, "under a settlement," whereas in the present case the persons in possession take under the *Thellusson Act*, and not under the "settlement" at all.

Jason Smith, for *Walter Raleigh Amesbury*:—

Under sect. 26, sub-sect. 1, it is the "tenant for life," or, under

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sect. 58, the persons having the powers of the tenant for life, who must take the initiative in having capital money applied in improvements; but here the persons having the powers of the tenant for life—namely, the testator's next of kin, who are entitled, under the order of the 11th of March, 1886, to the income of his estate—are naturally opposed to all improvements; so that, if any reference is made to the *Settled Land Act* in the order on this appeal, no improvements will be possible.

LINDLEY, L.J.:—

Now that we understand this case, I do not think there is any real difficulty in dealing with it. I will not read the words of the will, for I do not think it is necessary to do so; but in substance they amount to this. The income of certain property is directed to be applied in paying an annuity, and then, subject to that annuity, it is to be expended, during the life of the annuitant, in the purchase of additional land, or in the improvement of a landed estate, and in the maintenance in good and habitable repair of houses and tenements on that estate. There being nobody at present entitled to the income arising from the money so expended, the will contains a direction to accumulate for those purposes. Now then let us look at the purposes. It appears to me that, so far as words go, they would cover purposes which were within the *Thellusson Act*. On the other hand, they cover a great deal which is, to my mind, not within the *Thellusson Act* at all. All improvements in substance, which can in any fair sense be regarded as coming under the words, "maintaining in good habitable repair houses and tenements," appear to be outside the *Thellusson Act* altogether. There may be, as put by Lord Justice *Kay*, building land on the estate; money laid out in building houses on that land would be within the Act.

It seems to us that the right order to make is this. Leave Mr. Justice *Chitty's* declaration alone, but after it add these words: "But this declaration is not to authorize the application of income to purposes the expense of which ought to be defrayed out of capital." The practical result of that will be that if the trustees are in any difficulty, they can apply by summons for the direction

of the Court, and the difficulty will be surmounted. That will work perfectly well.

Then as to the costs. As the case is important, we think the costs of all parties, both here and below, when taxed, ought to come out of the funds in Court representing capital of the testator's estate.

LOPES and KAY, L.JJ., concurred.

Solicitors: *Paterson, Snow, Bloxam, & Kinder; Peacock & Goddard; Taylor, Son, & Humbert; Petch & Smurthwaite.*

G. I. F. C.

DANIEL *v.* FERGUSON.

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Feb. 25.

[1870 D. 2117.]

Mandatory Injunction—Erection of Buildings after Notice—Attempt to anticipate Injunction.

The Defendant in an action to restrain him from building so as to darken the Plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men, and by working night and day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex parte* interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, *Stirling*, J., restrained the Defendant from further building, and from permitting the wall which he had erected to remain:—

Held, on appeal, that this order was right, as the Defendant had endeavoured to anticipate the action of the Court by hurrying on his building, and that what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action.

THE Plaintiff was the owner of long leases of three adjoining houses, 49, 51, and 53 *Hereford Road, Bayswater*. In September, 1890, the Defendant prepared to build upon a piece of ground adjoining the south side of No. 49 a large building to be called *Hereford Mansions*. The Plaintiff had the plans inspected on his behalf, and came to the conclusion that the proposed erection would materially affect the access of light and air to his houses. After some correspondence, the Plaintiff, on the 28th of November, 1890, issued his writ in this action for an injunction, and on

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Saturday the 29th, notice of motion for injunction for Friday, the 5th of December, was by leave of the Court served on the Defendant, along with the writ. The service was between twelve and one o'clock. At two o'clock the Defendant turned on a large number of men, who went on building all through the night and until 2 P.M. on Sunday. On Monday they resumed work, and ran up the wall adjoining No. 49 to the height of about thirty-nine feet from the ground.

On Monday, the 1st of December, the Plaintiff, being informed of the rapid progress of the building, applied *ex parte* for an interim injunction till Friday, which was granted. Notice of this was given to the Defendant on the same day, and he ceased building.

When the motion of which notice had been given was brought on, the Defendant adduced evidence with a view to shewing that the Plaintiff had no easement of light over the Defendant's land. The facts deposed to were as follows:—

On the 16th of June, 1841, the Defendant's land was demised to *James Bott* for eighty years by the then owner. On the 15th of October, 1860, *Bott* underlet to *Underwood* for sixty years. *Bott* died in 1866, and, subject to the underlease, the eighty years' term was vested in his executors till 1884, when it was assigned to the Defendant's predecessors in title, who afterwards acquired the fee and got in the sixty years' term. The Plaintiff's property was demised to *James Bott* in 1854 by the trustees of the *Paddington* estate of the Bishop of *London*, and this leasehold interest remained vested in *Bott* and his executors till 1882, when it was assigned to the Plaintiff's predecessor in title. It thus appeared that from 1854 to 1882, *Bott* and his executors were entitled to the leasehold interests now vested in the Plaintiff, and also to the term of eighty years in the Defendant's property, subject to the underlease granted in 1860 to *Underwood.*

The evidence as to the effect of the building went to shew that it would seriously affect the light of No. 49.

The motion of which notice had been given came on to be disposed of on the 19th of December, and Mr. Justice *Stirling* made an order restraining the Defendant until judgment or

further order from building on the land in question so as to darken the lights of the Plaintiff's houses, and from permitting the wall or building which he had erected to remain on his land.

The Defendant appealed.

Horace Kent, for the appeal:—

I contend that there was such a unity of interest in *Bott* as to prevent the statute running between 1854 and 1882. If there had been unity of possession in the popular sense during that period, it is clear that no easement of light could have been obtained, and *Bott*, though not actually in possession, could not obtain an easement over land of which he had a lease. A tenant cannot prescribe against his landlord: *Outram* v. *Maude* (1); *Clay* v. *Thackrah* (2). It is true that unity of possession does not destroy an easement, but only suspends it: *Simper* v. *Foley* (3); but that applies only where the easement has been acquired, and here none was acquired, for a person cannot obtain an easement over land in his own occupation. The Plaintiff, therefore, is not entitled to an injunction; but if an injunction is granted at all, it ought not to be mandatory—it is against the practice to order a building to be pulled down on interlocutory application.

Buckley, Q.C., and *Frank Watson*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

I am of opinion that this appeal must be dismissed without dealing with the question to be decided at the trial whether the Plaintiff has an easement of light. It appears to be a nice question whether there was not at one time such a unity of possession as would prevent the Plaintiff's houses from acquiring the easement. The Plaintiff makes out a case entitling him to an injunction to keep matters in *statu quo* till the trial. That being so, the Defendant, upon receiving notice that an injunction is going to be applied for, sets a gang of men to work and runs up his wall to a height of thirty-nine feet before he receives

(1) 17 Ch. D. 391. (2) 9 Car. & P. 47.
(3) 2 J. & H. 555.

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notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once, without regard to what the result of the trial may be.

KAY, L.J.:—

I am of the same opinion. The questions to be decided at the trial may be of some nicety; but this is not the time to decide them. After the Defendant had received notice on Saturday that an injunction was going to be applied for, he set a large number of men to work, worked all night and through nearly the whole of Sunday, and by Monday evening, at which time he received notice of an interim injunction, he had run up his wall to a height of thirty-nine feet. Whether he turns out at the trial to be right or wrong, a building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the Court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the Court might decline to order them to be pulled down. I think that this wall ought to be pulled down now without regard to what the result of the trial may be. The appeal will therefore be dismissed.

Solicitors for Appellant: *Hatt & Co.*
Solicitor for Plaintiff: *G. Cheesman.*

H. C. J.

INDIGO COMPANY *v.* OGILVY.

[1890 I. 1358.]

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NORTH, J.
Feb. 13.
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March 9, 10, 13.

Jurisdiction—Firm, of which some Members were resident Abroad—Amendment of Writ—Fresh Causes of Action—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*g*)—*Service out of the Jurisdiction.*

The Plaintiffs, an English firm, entered into contracts in *India* with *G. & Co.*, an Indian firm, for the manufacture of indigo. *O. & Co.* were the English correspondents of *G. & Co.*, and there were some partners common to both firms, and some of the partners of each firm were resident in *India*. *G. & Co.* consigned indigo to *O. & Co.*, and the Plaintiffs brought an action against the firm of *O. & Co.* claiming the indigo, to which all the members of *O. & Co.* both in *England* and *India* appeared. The Plaintiffs then obtained an order *ex parte* to amend their writ by adding *G. & Co.* as Defendants and making consequential alterations in the writ, and also obtained leave to serve the amended writ on the Defendants out of the jurisdiction. In making the amendments, the Plaintiffs made the firm of *G. & Co.* Defendants, and added a claim in respect of fresh causes of action arising out of breaches of contract by *G. & Co.* in *India*, which were not included in the original writ. The members of the firm of *G. & Co.* appeared to the amended writ, and moved to discharge the order to amend as irregular.

North, J., granted the application:—

Held, that the original writ was wrongly issued against the firm of *O. & Co.*, some of the partners being out of the jurisdiction, and that the order to amend it was also bad. The Court accordingly set aside the amended writ, and gave liberty to the Plaintiffs to amend the original writ by substituting for the name of the firm of *O. & Co.* the names of the individual members of that firm and of the firm of *G. & Co.* who were in this country, and by adding a claim in respect of breaches of the contracts; the members of the two firms who were out of the jurisdiction being at liberty to set aside their appearances; without prejudice to any application by the Plaintiffs to add such members as parties, and to serve them with the amended writ.

Western National Bank of New York v. *Perez* (1) followed.

THE Plaintiffs were an English company, established for the purpose of acquiring the right to work and of working in *India* a patent process for the manufacture of indigo.

The first Defendants on the record were Messrs. *Ogilvy, Gillanders & Co.*, the *London* agents and correspondents of Messrs.

(1) [1891] 1 Q. B. 304.

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Gillanders, Arbuthnot & Co., a *Calcutta* firm, part proprietors and managers of two Indian indigo estates. The Plaintiffs and Messrs. *Gillanders, Arbuthnot & Co.* entered into written contracts, signed at *Calcutta*, on the 9th of May, 1887, and the 30th May, 1888, providing for the manufacture of indigo at the factories on the two Indian estates under the management of Messrs. *Gillanders, Arbuthnot & Co.* The contracts provided for the sale of the indigo manufactured under the patent process at *Calcutta*. The *Calcutta* firm consisted of six persons, five of whom constituted the English firm of *Ogilvy, Gillanders & Co.*, and some of the members of both firms were resident in *India*.

In January, 1890, the Plaintiffs wrote to Messrs. *Ogilvy, Gillanders & Co.*: "In consideration of your telegraphing to your *Calcutta* firm to ship the patent indigo made at *Begumserai* and *Khan Mirzapore* factories to this market instead of selling in *Calcutta* at the very low valuation of Rs.120 named, we hereby undertake to accept in presentation draft, or drafts, of your *Calcutta* firm, Messrs. *Gillanders, Arbuthnot & Co.*, for the amount due to the proprietors of *Begumserai* and *Khan Mirzapore* factories, *plus* Messrs. *Gillanders, Arbuthnot & Co.'s* disbursements for freight, insurance, and shipping charges at 90 d/s with document attached, for payment, and to pay the same at maturity."

In pursuance of that letter, Messrs. *Gillanders, Arbuthnot & Co.* shipped to *England*, consigned to Messrs. *Ogilvy, Gillanders & Co.*, for the Plaintiffs, 410 chests of indigo, and drew bills against the indigo on the Plaintiffs to the amount of over £17,000. The bills were negotiated in *Calcutta*. When presented to the Plaintiffs they were dishonoured, on the ground of their being in excess of the amount authorized. The bills were taken up by Messrs. *Ogilvy, Gillanders & Co.*

The original writ of summons in the action was issued on the 9th of October, 1890, against *Ogilvy, Gillanders & Co.* alone, indorsed as follows: "The Plaintiffs' claim is (1.) for a declaration that they are entitled to certain goods in the possession of the Defendants, to wit, 410 cases of indigo, shipped by *Gillanders, Arbuthnot & Co.* from *India* to the Defendants, or the proceeds thereof, and alleged by the Plaintiffs to have been shipped for or

on their account; (2.) for an order directing the Defendants to deliver the said goods, or their proceeds, to the Plaintiffs; (3.) for an injunction restraining the Defendants, their brokers or agents, from selling or disposing of the said goods, or any of them, or from receiving or dealing with the proceeds of any sale or disposition thereof; and (4.) damages for the wrongful conversion and detention by the Defendants of the said goods. The foreign members of the firm entered an appearance to this writ as well as the English.

At the time of the issue of the writ the indigo had been sold by Messrs. *Ogilvy, Gillanders & Co.'s* brokers. The proceeds of 175 chests had not been received. The brokers who had sold were subsequently added as Defendants. A motion was made in the action on behalf of the Plaintiffs to restrain the Defendants from parting with the indigo.

Affidavits were filed on the motion on both sides. It appeared from the affidavits on behalf of the Plaintiffs that they alleged that they were entitled to damages from *Gillanders, Arbuthnot & Co.* in respect of frauds committed by the native servants of Messrs. *Gillanders, Arbuthnot & Co.* at the indigo factories, during the process of manufacture on test days, so as to increase the amounts Messrs. *Gillanders, Arbuthnot & Co.* were entitled, as agents for the proprietors, to charge the Plaintiffs in respect of indigo manufactured under the patent process. An arrangement was come to as to the disposal of the proceeds of the indigo pending trial, and the injunction stood over till trial.

On the 15th of December, 1890, the Plaintiffs obtained from the Judge in Chambers an order *ex parte* giving leave to amend by adding Messrs. *Gillanders, Arbuthnot & Co.* as Defendants, "and by making such amendments in the indorsement of the said writ as may be necessary in consequence of the joinder of the said *Gillanders, Arbuthnot & Co.* as Defendants," and giving leave to issue a concurrent writ for service out of the jurisdiction.

The affidavits on the part of the Plaintiffs, alleging fraud on the part of Messrs. *Gillanders, Arbuthnot & Co.'s* native servants, had been filed, but were not used on the application for leave to add Messrs. *Gillanders, Arbuthnot & Co.* as parties. The

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application was based on an affidavit which did not refer to the alleged fraud.

The Plaintiffs amended their writ by adding Messrs. *Gillanders, Arbuthnot & Co.* as Defendants, and adding to the indorsement: "And the Plaintiffs also claim against the Defendants, *Gillanders, Arbuthnot & Co.*, (5.) £5000 for money received by them to and for the use of the Plaintiffs, and for damages for breach by them of two agreements in writing, dated respectively 9th May, 1887, and 30th May, 1888."

A motion was now made on behalf of *Gillanders, Arbuthnot & Co.*, to discharge the order of the 15th December, 1890, giving liberty to add *Gillanders, Arbuthnot & Co.* as parties, "unless the Plaintiffs in this action undertake to confine themselves in this action to such a breach or breaches of the agreements between them and the said *Gillanders, Arbuthnot & Co.* as took place within the jurisdiction of this Court, on the ground that the substantial dispute between the Plaintiffs and the said *Gillanders, Arbuthnot & Co.*, with reference to the said agreements, relates to matters and alleged breaches arising outside the jurisdiction of this Court."

The motion was heard before Mr. Justice *North* on the 13th of February, 1891.

Cozens-Hardy, Q.C., and *Cababé*, for the Applicants:—

The fifth claim, added by amendment, is a claim not affecting in any way the Defendants, who are within the jurisdiction; it relates to a question it would be inconvenient and unjust to try in *England*. None of the rules relating to service out of the jurisdiction enable the Plaintiffs to sue the Defendants out of the jurisdiction in this Court in respect of that claim. The proper course for the Defendants out of the jurisdiction to get rid of the claim is to apply to have the order to amend discharged; and then the Court, if it sees fit, can allow the order to stand, on proper terms; and the proper terms are that the Plaintiffs undertake to confine the action within the limits of the claim to the indigo conveyed to this country: *Diamond* v. *Sutton* (1); *Thomas* v. *Duchess of Hamilton* (2). The charge of fraud raised by the

(1) Law Rep. 1 Ex. 130. (2) 17 Q. B. D. 592.

Plaintiffs had been made and was in evidence in the action before the application to amend was made. The real substantial dispute relates to the charge of fraud. The fact of that charge ought to have been prominently called to the attention of the Court when the application to amend was heard. The Court will not allow an action, properly an Indian action, to be brought here by a side wind.

Napier Higgins, Q.C., and *W. S. Robson*, for the Plaintiffs:—

Gillanders, Arbuthnot & Co. were properly added as Defendants under Order XI., rule 1, sub-clause (*e*), because there was a breach of contract within the jurisdiction: *Reynolds* v. *Coleman* (1); and also because under sub-clause (*g*) of the same rule they are necessary or proper parties. The *Calcutta* firm consisted of six persons, and the English firm of five of the same persons, and directly or indirectly the rights of each firm were governed by the same contracts with the Plaintiffs, so that all questions should be settled in one action, which ought to be in this country, where the present litigation was rightly commenced: *Massey* v. *Heynes* (2).

NORTH, J.:—

I do not see my way to making any order, except that of discharging the order giving leave to amend.

The action was brought by the Plaintiffs against *Ogilvy & Co.*, and the relief asked for by the writ was a declaration that the Plaintiffs are entitled to 410 chests of indigo shipped by a firm of *Gillanders, Arbuthnot & Co.* from *India* to the Defendants, or the proceeds thereof, and alleged by the Plaintiffs to have been shipped for or on their account; secondly, for an order directing the Defendants to deliver the goods or their proceeds to the Plaintiffs; thirdly, for an injunction restraining the Defendants from selling or disposing of the goods; and fourthly, damages for the wrongful conversion and detention by the Defendants of those goods. Upon that writ being issued certain proceedings took place with reference to a motion for injunction against the Defendants. Those matters are not before me; but I have an

(1) 36 Ch. D. 453. (2) 21 Q. B. D. 330.

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order, which was made on the 15th of December, by me in Chambers, upon an affidavit filed on the 6th of December, 1890. I do not think it necessary to read it through; but it does, in my opinion, justify the order that was made for adding the Indian firm as Defendants to the action. The order made was that the Plaintiffs were to be at liberty to amend the writ by adding *Gillanders, Arbuthnot & Co.* of *Calcutta*, in the empire of *India*, as Defendants, and by making such amendments in the indorsement to the said writ as may be necessary in consequence of the joinder of the said *Gillanders, Arbuthnot & Co.* as Defendants. That is to say, there being a writ actually raising certain definite issues, there was a reason for giving leave to add the Indian firm as Defendants to that action. What the Plaintiffs proceeded to do was to amend the writ in a way which was not addressed to that matter at all. They added this: "And the Plaintiffs also claim against the Defendants, *Gillanders, Arbuthnot & Co.*, £5000, for money received by them to and for the use of the Plaintiffs, and for damages for the breach by them of two agreements in writing, dated respectively the 9th May, 1887, and the 30th May, 1888." Now, as soon as one sees that writ, one is struck by this, that it starts against the new Defendants with asking for new relief, and nothing else, except so far as the word "also" goes. The word "also" makes the original relief extend to the new Defendants, and then it adds this new relief, which is not asked against the original Defendants at all, and it is not suggested there is any ground upon which it could be got against the old Defendants, or come in any way within the purview or scope of the old writ.

That is, first of all, against the new Defendants alone, a claim of £5000, and also damages for breach of certain agreements that are never mentioned in the original writ at all. In my opinion that amendment went far beyond anything for which leave was given by the Court, and the Defendants would be entitled to get rid of the service upon them of this amended writ, upon the ground that the service of such a writ as that was never authorized at all. They have not taken that line, but they have taken a line which, as a matter of form, seems to be entirely different. They have asked to discharge the order, and that can only be

done if the order is wrong—either wrong in itself, or obtained under circumstances under which it ought not to have been made. In my opinion, upon the evidence before me, it was not wrong in itself; but my attention has since been called to certain affidavits—three, I think, in number—made upon the motion for injunction to which I have already referred, and from those affidavits, all made before the 6th of December, it is quite clear that the claim they are setting up against *Ogilvy's* is something very much larger than was included in the indorsement on the writ as originally issued. They are seeking relief against *Gillanders* that could not be got against *Ogilvy's* at all, and with respect to obtaining which against *Gillanders*, *Ogilvy's* and the brokers, *Patey & Co.*, are not even necessary parties at all. Therefore it is, without any leave, embarking in a fresh litigation, wholly foreign to that which was originally commenced, and it is seeking to bring in for the purpose of this fresh litigation matters in which the original Defendants are not in any way concerned.

That is a matter that was not brought before me at the time at which the application was made; and if it had been pointed out to me that the relief that was being asked against the new Defendants would be very slightly material as regards all that was sought against the old Defendants, but would be opening a new field of litigation against the new Defendants, not covered by the original writ at all, I should certainly have declined to make any such order as was made.

If the facts existing at the time and stated in the affidavits on behalf of the Plaintiffs in this action had been brought before me when that order was made, the order would not have been expressed in the form in which it is. I certainly should not have given leave to sue the new Defendants in respect of anything that was not the subject of a suit already against the old Defendants; and, as this goes very much further, I must discharge the order.

I think I am entitled on this motion to let the order I make take the form of discharging the order of the 15th of December, instead of relieving the Defendants from the service of the writ, upon the ground that the order was obtained without putting

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before me at the time information which was already existing in the form of affidavits, and which it was most material that I should know.

D. P.

From this order the Plaintiffs appealed. The appeal came on to be heard on the 9th of March, 1891.

Napier Higgins, Q.C., and *W. S. Robson*, for the Appellants, cited *Western National Bank of New York* v. *Perez* (1).

Cozens-Hardy, Q.C., and *Cababé*, for the Respondents, referred to *Massey* v. *Heynes* (2).

Napier Higgins, in reply.

1891. March 13. LINDLEY, L.J.:—

This is an action brought by a limited company in this country against a firm called *Ogilvy, Gillanders & Co.*, and, according to the indorsement on the original writ, it appears to be neither more nor less than an action of trover. Some of the partners in *Ogilvy, Gillanders & Co.* do not reside in this country, and the Plaintiffs, therefore, were wrong in issuing their writ, without leave, against that firm. There is no order which justifies it at all. Some of the partners being abroad, they ought to have applied for leave to serve the partners abroad. But then those members of *Ogilvy, Gillanders & Co.* who are abroad have, we are told, appeared, and if there had been nothing more in it there would be no reason why that appearance should be in any way disturbed. But the Plaintiffs obtained an order *ex parte* whereby it was ordered that the Plaintiffs should be at liberty to amend the writ of summons by adding *Gillanders, Arbuthnot & Co.*, of *Calcutta*, in the Empire of *India*, as Defendants, and by making such amendment in the indorsement of the said writ as might be necessary in consequence of the joinder of *Gillanders, Arbuthnot & Co.*; and then it was ordered that the Plaintiffs should be at liberty to issue a concurrent writ, and so on. After that an application was made on behalf of the *Calcutta* firm to discharge

(1) [1891] 1 Q. B. 304. (2) 21 Q. B. D. 330.

that order. In the interval the Plaintiffs had availed themselves of the order by amending their writ, adding the name of the *Calcutta* firm, and introducing a new cause of action altogether, suing now both firms for breaches of two agreements which were entered into, as I will afterwards mention. Mr. Justice *North*, on considering the matter, came to the conclusion that the liberty which had been given by the order I have just read was merely confined, and was intended to be confined, to this—to adding the *Calcutta* firm for the purpose of obtaining relief against the English firm according to the claim on the writ—for there is no statement of claim yet—and he considered it to be going beyond what was intended by that order, and beyond what was reasonable and proper, to recast the whole case and add the *Calcutta* firm with a view to the case so made, and he discharged the order. From that the Plaintiffs appeal.

Now, it appears to me that on both sides there have been misconceptions in this matter. In the first place, I take it to be now settled after the discussion which this matter has undergone in the case of the *Western National Bank of New York* v. *Perez* (1), that you cannot sue a firm, some members of which are abroad, at all events, without leave; that if you can sue them at all in the firm name, which seems to be doubtful, you must at all events obtain leave. Therefore, when this writ was issued, it was all wrong, so far as the foreigners were concerned. Then the addition of the *Calcutta* firm did not make it more right. That was wrong too; and therefore the order which Mr. Justice *North* made, giving the Plaintiff liberty to amend by adding another firm to a defective writ was wrong, and that order ought to be discharged and put right; in other words, the appeal ought to fail.

But then comes the question what is to be done? It is not right for this Court, or any Court to play at battedore and shuttlecock with suitors, and Mr. Justice *North* ought, it appears to me, to have given the Plaintiffs liberty to amend their writ in such a way as they could without doing any injustice to the Defendants, and I propose now to state the order which we think he ought to have made, and to make that order.

(1) [1891] 1 Q. B. 304.

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Before doing that, I will make one or two remarks about the cause of action here. The real cause of action arises from alleged breaches of two contracts made in *Calcutta* between the *Calcutta* firm and the Plaintiffs. Some of the alleged breaches were in *Calcutta*, and some of the alleged breaches are in this country. But the Plaintiffs' rights are based entirely on those contracts. Now there are two firms, one of them of five partners, and the other of six, and the five are members of the *Calcutta* firm. All the members of the English firm are members of the *Calcutta* firm; but there is one member of the *Calcutta* firm who is not a member of the English firm. Now if partners abroad enter into any agreement with a person here, and some of those partners are resident here, those resident here can be sued for any breach of that agreement, whether the breach is in this country or whether it is abroad. I apprehend there is no doubt at all about that, and the struggle to prevent the Plaintiffs here from suing the partners here for breaches abroad appears to me to be almost futile. It can be done in some way or another; but I do not say it can be done in the shape in which the Plaintiffs have attempted to do it. On the other hand, the Plaintiffs have got into a hopeless confusion, and I think it is not right to leave them in that state in which no good can accrue to them and no good can accrue to the Defendants when there is a very serious matter in controversy between them.

In order to do justice, therefore, it appears to me that Mr. Justice *North* ought to have done this; and we propose to do it. First of all, we dismiss this appeal with costs, because the form is all wrong; and we set aside the amended writ. The Plaintiffs are to be at liberty to amend their original writ by substituting for the name of the firm, *Ogilvy, Gillanders & Co.* (that is the name on the original writ), the names of the members thereof, and the names of the members of the firm of *Gillanders, Arbuthnot & Co.*, who are in this country; and to amend the writ by adding a claim for relief in respect of any illegal breaches of the contracts of May, 1887, and May, 1888. Now, if we stop there, that would hardly be fair; because some members of the firm of *Ogilvy, Gillanders & Co.* are resident abroad, and they have appeared, and it would not be right, I think, to pin them to

their appearance to the amended writ, which disclosed a totally new cause of action; and I do not know that they would have appeared to that. Therefore, we propose to do this. The members of the above firms who reside abroad, and who have appeared to the original writ, are to be at liberty to set aside their appearances. That will leave as Defendants those members of the two firms who are in this country. Of course, they must appear, and meet any cause of action which the Plaintiffs can have against them. Then, we propose to add this, which may or may not be necessary—and I do not know whether it will or will not—"and this order is to be without prejudice to any application which the Plaintiffs may make to add as parties to such amended writ all or any of the co-partners of the said Defendants who are not resident in this country, and to serve them with such amended writ, or a concurrent writ, as the Plaintiffs may be advised." We do not now give them liberty to do that for two reasons. In the first place, I do not know that it is necessary; and, in the next place, if it should become necessary, there may, for anything I know, be reasons which the Defendants can shew against their being joined. I think, therefore, it would not be fair to the Defendants to go so far as to give the Plaintiffs liberty to do it now; but inasmuch as, by striking out those two firms, this order may very seriously embarrass the Plaintiffs, we propose to put it in that form—that the order is to be without prejudice to any application which they may make, if they find it necessary; although, so far as I can see, they will not find it necessary.

KAY, L.J.:—

I assent to the proposed order, and I will shortly state my view of the matter. The writ, as originally framed, asked for a declaration against the persons who are now Defendants to it, who were named by the name of the firm, *Ogilvy, Gillanders & Co.*, that the Plaintiffs were entitled to certain goods in the possession of the Defendants; and, secondly, for an order directing the Defendants to deliver those goods, or their proceeds, to the Plaintiffs; and, thirdly, for an injunction to prevent them disposing of the goods otherwise; and, fourthly, damages for wrongful

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conversion and detention by the Defendants of the said goods. That is all that appears on the writ; and the effect of that is a suggestion that there are certain goods in the possession of the firm, who were Defendants, in this country, to which the Plaintiffs have a right; and they seek practically to recover those goods. Well, that firm, it appears, was entirely an English partnership, and some of the members were actually in *England.* Others of the members of that firm were not in *England,* but were in *India*; but they all appeared to the writ, so that so far as any claim was asserted against the specific goods in the possession of the firm in *England,* there was a complete action. However, the Plaintiffs were not satisfied with that. They wanted to add a firm, who are, in fact, an Indian firm, and carry on business in *Calcutta.* That Indian firm is composed of all the members of the English firm, and one additional member, so that it is a separate firm; and the Plaintiffs obtained, under an *ex parte* order, leave to add that firm, and to amend their writ; and then they amended their writ by adding that Indian firm also by the name of the firm, *Gillanders, Arbuthnot & Co.,* not making any of the individuals, either of the English or foreign firm, parties to the writ; and then they added to the writ this claim: "And the Plaintiffs also claim against the Defendants, *Gillanders, Arbuthnot & Co.,* £5000, for money received by them to and for the use of the Plaintiffs, and for damages for the breach by them of two agreements in writing, dated respectively the 9th of May, 1887, and the 30th of May, 1888." Now, that is the first mention of those agreements in the writ, and the effect of that writ, as amended, is to ask all the original relief, not only against the English firm, but also against the Indian firm, and to add certain special relief against the Indian firm which is, in point of fact, alternative, and, probably, inconsistent relief.

The facts, as now appears, are these: There were two agreements between the Plaintiffs and the Indian firm, the English firm not being party to either of those agreements. They were altogether agreements with the Indian firm, and those agreements were practically for the use by the Indian firm of certain patent processes of the Plaintiffs in preparing indigo; and it is claimed (I am not at all wishing to indicate any opinion of my

own as to the real meaning), that by virtue of one or other of those agreements the Indian firm were bound to consign to this country indigo so prepared; and the Plaintiffs' claim is that, when the indigo so prepared was consigned to this country, they had a right to that specific indigo. But, under this amendment of the writ, they are not merely claiming the specific indigo which is being transmitted to this country, but they want damages against the Indian firm for breaches of those two contracts. Now, that relief is alternative relief; or, at least, it is relief which is not in the least degree involved in the writ as originally framed; and under it the Defendants state that they are apprehensive that claims may be made against the Indian firm for breaches of these two contracts, or one of them, which occurred in *India*. Now, it is quite clear that an original writ for breaches of these contracts, which breaches occurred in *India*, would not be allowed to issue in this country against people resident abroad. If the Defendants, against whom that sort of relief was asked, were resident abroad, the answer to any application to allow a writ to be issued against them in this country would be: "Your cause of action, the breach of the agreement, is abroad. It does not come within the terms of the orders at all. You must sue them in the country in which the breach occurred." I take it, that is very clear indeed; and what the Defendants say is this: "The Plaintiffs are now trying under guise of an amendment of their writ, and by reason of the leave they obtained *ex parte*, to add the foreign firm as parties in order to obtain against that foreign firm relief, which, unless they had joined them in this way, they would not have been allowed to have obtained in this country at all." That I understand to be the main difficulty which the Defendants raise.

Now, certainly, one case which was referred to has gone very far. It is a case of *Massey* v. *Heynes* (1), in which, first of all, the Divisional Court, and afterwards the Court of Appeal, did allow the addition by amendment of persons resident abroad, to an action commenced against persons resident in this country, and allowed the plaintiffs to ask against the persons resident abroad alternative relief, which could not have been obtained upon an

(1) 21 Q. B. D. 330.

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original writ against those persons alone, because the cause of action was not a cause of action in this country, and did not come within the rule. Mr. Justice *Wills*, in a very careful and well-considered judgment, says this (1): "The brokers made a charterparty with the plaintiffs which had to be performed in the *Mediterranean*, and was there broken. On complaint made to the defendants abroad, they answered that the brokers in *England* had exceeded their authority in effecting the charterparty in the terms which it contained, and therefore that the foreign firm was not liable. Thus two sets of persons were involved in the transaction, against whom the plaintiffs had no joint remedy or joint cause of action, but in respect of each of whom the suggested cause of action against one excluded that against the other: for if the firm abroad had given authority to the brokers in *London* to make this charterparty, no action would lie against the brokers; if, on the other hand, the firm had not given authority to the brokers, no action would lie against the Austrian firm, but an action would lie against the brokers for breach of their implied warrant of authority. So that perhaps no case could be put in which the objections which have been raised to the service out of the jurisdiction would be more strikingly illustrated. The Austrian firm certainly could not have been served alone, because under none of the sub-sections of Order XI., rule 1, would a case for service out of the jurisdiction against them arise. Also, if the action succeeded against the foreign firm, it would be on the ground that the English defendants were not liable, and therefore, in one sense, ought not to have been sued." But the result of that case was this—that both the Divisional Court and the Court of Appeal agreed that the claims against the persons resident in *England* and the foreign firm arose out of the same transaction, and therefore, there being a *bonâ fide* claim against the persons resident in *England*, it was proper in that case to allow the foreign firm to be joined on alternative relief sought against the foreign firm, which could not have been obtained in an action against the foreign firm alone, because they could not have been served. This case, certainly, is a very strong one; and Mr. Justice *Wills* says, in a further part of his

(1) 21 Q. B. D. 332.

judgment (1): "If there was the least ground for saying the action was brought against the brokers in this country *malâ fide*, and with the knowledge that they were not liable, simply to try in *England* a case which otherwise could not be tried here, then, although the action was against a person in this country it would not be 'properly' brought." In such circumstances he held that leave to add the foreign firm and serve them abroad could not be given. But I do not think that case properly applies to what has been done here, for in the first place there would be the difficulty, which Lord Justice *Lindley* has pointed out, in the frame of the original action. It was not right to frame this original action by making the English firm Defendants simply in the name of the firm. The proper way would have been to make the partners in that firm parties by their individual names, and then, if it was a proper case, leave might be obtained to serve those who were abroad. Or another mode of proceeding would have been merely to have made those members of the English firm, who were actually resident in this country, parties, and not to have added those members who were resident abroad. But the Plaintiffs did not do that, and no doubt they were justified in saying that any defect of that kind was cured by the fact that the partners in that firm, though resident abroad, put in an appearance. However, now they are seeking to deal with the foreign firm in the same kind of way. They do not make the individual members of that foreign firm parties at all; but they have made the firm parties by the name of their firm only, without naming any of the individual members. It seems to me that is wrong, and I cannot divest myself of the notion that the Plaintiffs really have found out that their cause, as the writ was originally framed as against the English firm, is a weak one, or at any rate that it does not raise the real point they want to try, as they really want to try a question of breaches of these contracts abroad by the foreign firm, and therefore I am not quite convinced that this was a *bonâ fide* case of bringing the foreign firm before the Court, and I rather think the case comes within those last observations of Mr. Justice *Wills*, which I have read.

But now what is to be done. Supposing this writ were

(1) 21 Q. B. D. 334.

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altogether set aside, and the action were stayed or dismissed, still it is quite clear that the Plaintiffs might sue any of the members, either of the English or foreign firm, whom they happen to find in this country, and there are such members here. There are members here who are both members of the English firm and of the foreign firm, and if the Plaintiffs choose to bring an action against those members alone, nobody could prevent them, and it would be no answer to say, "You are bringing an action against a member of a foreign firm in respect of a breach of contract in that foreign country." They have a right to do it if they find him here; they have a right to assert their remedy against a defendant who is in this country in respect of a breach of contract which occurred abroad. Therefore, in considering what is the proper course for the Court now to take, it seems to me it is not right that we should simply affirm the order of Mr. Justice *North* without putting the parties, as far as may be proper now, in a position which they might clearly put themselves in if they liked without any authority of the Court. I therefore quite assent to the order which Lord Justice *Lindley* has stated. It enables the parties, if they please, to put their writ in a right form, and in a form which the Court could not prevent their putting it in; and it obviates the necessity of issuing a new writ, by giving them leave to amend this writ, and to utilize the proceedings which have been taken up to this point, if they please, for the purpose of the action which they contemplate bringing. More than that at present, I agree, it would not be well to do; but I have been considering the case very anxiously, with a view, if possible, of preventing our having this fight, which was a somewhat prolonged one, considering the matter involved, all over again in Court—a danger which, I am afraid, we have not altogether obviated.

The following is a minute of the order drawn up:—

Dismiss the appeal with costs, and set aside the amended writ; but the Plaintiffs are to be at liberty to amend their original writ by substituting for the name of the firm, *Ogilvy, Gillanders & Co.*, the names of the members thereof and of the firm, *Gillanders, Arbuthnot & Co.*, who are in this country, and to amend the said writ by adding a claim for relief in respect of any alleged breaches of the contracts of May, 1887, and May, 1888; and the

members of the above firms who reside abroad, and who have appeared to the original writ, are to be at liberty to set aside their appearances. And this order is to be without prejudice to any application which the Plaintiffs may make to add as parties to such amended writ all or any of the co-partners of the said Defendants who are not resident in this country, and to serve them with such amended writ or a concurrent writ as the Plaintiffs may be advised.

Solicitors: *E. W. & R. Oliver; Slade & Munk.*

M. W.

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[1889 B. 3323.]

Principal and Surety—Giving of Time—Covenant to pay Mortgage Debt—Covenant in Consolidation Deed to pay at later Date—Discharge of Property as well as Personal Liability of Surety—Tenants in Common—Redemption Action—Parties.

Where a surety pledges his personal credit by bond or covenant, and by the same contract pledges also his goods, or mortgages or charges his lands, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the back of the surety—*e.g.*, by a consolidation deed, with a fresh covenant for payment of the principal sum with other moneys subsequently advanced at a later date—not only discharges the surety from all personal liability (1), but also releases the property which the surety had included in the contract.

Wheatley v. *Bastow* (2), *Hodgson* v. *Hodgson* (3), and *Holme* v. *Brunskill* (4) discussed.

Parties necessary to a redemption action by mortgagees of the interests of tenants in common, whether of an undivided share or of the entirety, stated.

ACTION by *George Bolton*, a puisne mortgagee, to redeem a prior incumbrancer, under circumstances which, so far as material for the purposes of this report, were as follows.

By an indenture of the 18th of October, 1854, two undivided fourth shares in a freehold farm at *Bardwell*, in the county of *Suffolk*, known as *Clarke's Farm*, belonging respectively to *Susan Booty* and the Defendant *Sarah Buckenham*, and an equitable charge on the entirety of the said farm for £850, belonging to the Defendant *Sarah Buckenham*, were conveyed and assured to one *Eliza Middleditch*, by way of mortgage, to secure £1000 and interest. The deed, though containing the usual covenants by both mortgagors, was entered into by the Defendant *Sarah Buckenham* as surety only.

By an indenture of the 4th of September, 1857, *John Clarke Buckenham*, the Defendant *Sarah Buckenham*, and *Robert G.*

(1) See *Bolton* v. *Buckenham* [1891] 1 Q. B. 278.
(2) 7 D. M. & G. 261.
(3) 2 Keen, 704.
(4) 3 Q. B. D. 495.

Buckenham, entered into a joint and several covenant with one *Cooper* for the repayment on the 4th of March then next ensuing of an advance of £450 made by *Cooper* to *John Clarke Buckenham*, with interest at £5 per cent.; and by the same indenture, two undivided fourth shares in *Clarke's Farm*, belonging respectively to *John Clarke Buckenham*, and *Robert G. Buckenham*, and the Defendant *Sarah Buckenham's* said undivided fourth share, and her said equitable charge for £850 on the entirety, were conveyed to *Cooper*, subject, as to the Defendant *Sarah Buckenham's* interest, to the said mortgage of the 18th of October, 1854, by way of security for the said sum of £450 and interest. This deed was executed by the Defendant *Sarah Buckenham* and *Robert G. Buckenham*, as sureties for *John Clarke Buckenham*.

John Clarke Buckenham, having effected other mortgages of his interest in *Clarke's Farm*, and also of other property, to secure repayment of divers advances, subsequently arranged for the consolidation of all his incumbrances, including that of the 4th of September, 1857, by a deed of the 15th of December, 1884, under which *George Bolton*, the Plaintiff, was the mortgagee. By this deed, after reciting that *John Clarke Buckenham* was entitled to one undivided share in *Clarke's Farm*, subject to the incumbrance created by the indenture of the 4th of September, 1857, and to other subsequent charges thereon, which were specified, and that he was also entitled to other property, subject to some of the aforesaid charges, and other charges therein specified; and reciting, that the said *John Clarke Buckenham* had applied to the Plaintiff to advance the total sum of £3200—in order to pay off the before-mentioned several mortgages and charges, which he, the Plaintiff, had agreed to do, "upon having the said several mortgages and charges transferred to him, and upon having repayment thereof with interest further secured in manner hereinafter appearing," the various mortgagees respectively, in consideration of the payment of the amount of their respective debts, conveyed to the Plaintiff such debts, "and the full benefit of the covenants and other powers and provisions" contained in their respective mortgage deeds for securing the payment of the respective

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principal sums and interest, "and of all securities for the same." The said one undivided fourth share in *Clarke's Farm* belonging to *John Clarke Buckenham* was, with other properties, then conveyed to the Plaintiff, subject to a proviso for redemption upon the repayment of the total amount of £3200 advanced by him; and *John Clarke Buckenham* covenanted to pay to the Plaintiff the sum of £3200 (being the total amount of the various mortgage debts consolidated) on the 19th of January, 1885, with interest as therein provided.

By another indenture of the 27th of July, 1889, the rights and shares of the Defendant *Sarah Buckenham* and of *Robert G. Buckenham* in *Clarke's Farm*, so far as the same were then vested in the transferees under the said indenture of mortgage of the 4th of September, 1857, were, according to the Plaintiff, conveyed to him in fee simple, subject to such right as was then subsisting therein under such indenture.

Neither the Defendant *Sarah Buckenham* nor *Robert G. Buckenham* were parties to either of the two last-mentioned deeds.

In April, 1889, the Defendant *Sarah Buckenham* paid off the £1000 secured by the said indenture of the 18th of October, 1854, and caused the same to be transferred to the Defendant *C. E. Salmon*, as trustee for her.

In July, 1889, the Plaintiff commenced the present action against *C. E. Salmon* and *Sarah Buckenham*, claiming a declaration that he was entitled to redeem the said mortgage of the 18th of October, 1854, redemption of the said mortgage, and foreclosure of the equity of redemption of the Defendant *Sarah Buckenham*.

The case as opened gave rise to many complicated questions; but eventually the only question argued and decided which requires any detailed notice was, whether the effect of the consolidation deed of the 15th of December, 1884, by giving time to *John Clarke Buckenham*, the principal debtor, without consulting the surety, *Sarah Buckenham*, was not only to discharge her from all personal liability under the deed of the 4th of September, 1857 (as had already been decided in *Bolton* v. *Buckenham* (1)), but also to release the securities which she,

(1) [1891] 1 Q. B. 278.

as surety, had included in that mortgage. Another incidental point, but one which is sufficiently dealt with in the judgment, was that the action as a redemption action was defective for want of parties.

Byrne, Q.C., *Haldane*, Q.C., and *Lyttelton Chubb*, for the Plaintiff:—

The effect of the indentures of the 15th of December, 1884, and the 27th of July, 1889, is, that there is now vested in the Plaintiff the three undivided shares of the Defendant *Sarah Buckenham*, of *John Clarke Buckenham*, and of *Robert G. Buckenham* in *Clarke's Farm*, subject, only as regards the share of the Defendant *Sarah Buckenham*, to the mortgage of the 18th of October, 1854. The Plaintiff is, therefore, entitled to redeem this mortgage. The fact that the Defendant's personal liability on the covenant in the mortgage of the 4th of September, 1857, has been released by giving time to the principal debtor, does not necessarily release the securities mortgaged by that deed, and which are now vested in the Plaintiff. Our case is, that the security still remains vested in the Plaintiff, and that he is, therefore, entitled to redeem the Defendant's share and interest. This point has never yet been expressly decided.

Jason Smith, for the Defendants:—

The action as a redemption action is defective for want of parties. On principle and on authority the surety is released by giving time to the principal debtor by transactions to which the surety is no party, and this release extends not only to the surety's personal liability on the covenant, but also to the property charged: *Wheatley* v. *Bastow* (1); *Hodgson* v. *Hodgson* (2); *Holme* v. *Brunskill* (3). The Plaintiff, therefore, is no longer an incumbrancer on the Defendant *Sarah Buckenham's* share and interest, and consequently cannot redeem.

Byrne, in reply.

(1) 7 D. M. & G. 261. (2) 2 Keen, 704.
(3) 3 Q. B. D. 495.

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1891
BOLTON v. SALMON

1891. Feb. 10. CHITTY, J. (after stating the mortgage of the 18th of October, 1854, and the way in which it became vested in the Defendants, and having disposed of another question, which it is not necessary to notice in this report, continued:—)

The Plaintiff then claims to redeem the mortgage of 1854, and on redemption to foreclose the Defendants by virtue of a subsequent security which he alleges is vested in him. The only parties to the action are the Plaintiff and the Defendants *Salmon* and Miss *Buckenham*. As a redemption suit, it is plain that the action is defective for want of parties. Mr. and Mrs. *Booty* are not parties, nor are their interests in Mrs. *Booty's* one-fourth share represented in the action. The Plaintiff claims only to be a subsequent incumbrancer; where a mortgage is made by two tenants in common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party (see *Cholmondeley* v. *Clinton* (1)). For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate. Towards the close of the argument the Plaintiff's counsel asked for liberty to amend by adding parties: had I granted this liberty it would only have been on the terms of the Plaintiff paying all the costs thrown away. There are other objections for want of parties; but it is not necessary to discuss them beyond saying that all the four tenants in common, or those who claim the equity of redemption under them, are necessary parties to an action to redeem the charge on the entirety.

The Plaintiff claims a right to redeem as a puisne incumbrancer, by virtue of a mortgage of 1857, and he alleges that all the securities created by this mortgage are now vested in and enforceable by him by virtue of a deed of transfer and consolidation dated the 15th of December, 1884, and another deed dated the 27th of July, 1889. For the purposes of this portion of my judgment, I will assume, in favour of the Plaintiff, that the security created by Miss *Buckenham* by the deed of 1857 was

(1) 2 J. & W. 134.

effectually transferred to and vested in the Plaintiff by the operation of those two deeds, though Miss *Buckenham* was not a party to either.

[His Lordship then stated the mortgage of the 4th of September, 1857, and continued:—]

Now, it has been decided in an action brought by the Plaintiff against Miss *Buckenham* in the Queen's Bench Division, that the effect of the deed of 1884 was, to discharge Miss *Buckenham* from her liability, under the covenant in the deed of 1857: see *Bolton* v. *Buckenham* (1). The Plaintiff's counsel, however, contend that, although Miss *Buckenham's* covenant is gone, by reason of time having been given to the principal debtor, the security which she gave remains. With all their learning and research, the Plaintiff's counsel were not able to produce any authority for this proposition. The reason may be, that no one had ever previously thought of raising such a contention. For the Defendants, two cases were cited. The first was *Wheatley* v. *Bastow* (2). This is not an express decision on the point. There a brother and sister, entitled in moieties to a reversionary interest in a fund in Court, mortgaged it to secure the debt of the brother, the sister joining as surety only. On the facts the Court decided that the surety was not discharged. But it seems to have been assumed throughout the case, both by the eminent counsel engaged, and by the Court, consisting of Lords Justices *Knight Bruce* and *Turner*, that, if the facts had shewn a release, the mortgaged property of the surety would have been discharged. The second case is *Hodgson* v. *Hodgson* (3). There it was held that the release of one co-surety discharged the security given by the other. This is in point. On principle I can find no ground for the proposition that, although the surety's covenant is gone by alteration of the contract with the principal debtor, yet the security which the surety has given remains bound. A surety pledges his personal credit by note, covenant, or otherwise, and by the same contract pledges also his goods or charges, or mortgages his lands, as security for the same debt. The alteration of the contract without his consent or without the reservation of rights against him affects his position equally in regard to every part of his contract of suretyship. As was said

(1) [1891] 1 Q. B. 278. (2) 7 D. M. & G. 261. (3) 2 Keen, 704.

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by Lord Justice *Cotton*, in *Holme* v. *Brunskill* (1): "The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord *Loughborough*, in *Rees* v. *Berrington* (2), 'It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety), who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.'" The true rule, as the Lord Justice went on to shew, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable. This reasoning applies with the same force to a security given by the surety as it does to a personal obligation entered into by him. Moreover, the deed of 1884 gave time to *John C. Buckenham*, the principal debtor, not only in respect of his covenant, by the taking of a new covenant, which (at least) suspended the right to sue on the covenant of 1857; but also in respect of the right and the time for redemption. The right of redemption under the indenture of 1857 was discharged, and a new proviso for redemption was inserted, conferring (according to its terms) the right to redeem by *John C. Buckenham*, or any person claiming under him, on payment of the entire consolidated debt of £3200, on the 19th of January, 1885 So that there was in this respect a giving of time in relation to the security itself. The result is that the security Miss *Buckenham* gave by the deed of the 4th of September, 1857, is released, and consequently the Plaintiff has no title to redeem her.

[His Lordship then dealt with the consolidation deed of the 15th of December, 1884, and the transfer of the 27th of July, 1889, which he held as a matter of construction did not pass the shares and interest of the Defendant *Sarah Buckenham* and *Robert G. Buckenham*, and eventually dismissed the action with costs.]

Solicitors: *Arthur B. Chubb; Gilbert Robins*, agent for *Salmon & Sons, Bury St. Edmunds.*

(1) 3 Q. B. D. 505.

(2) 2 Ves. 540.

W. C. D.

In re WATSON & SONS, LIMITED.

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1891
March 6, 7, 10.

Company—Winding-up—Voluntary Winding-up under Supervision—Wishes of Creditors—Restrictions imposed on Liquidator—Committee of Inspection—Creditors' Representative—Form of Order—Companies Act, 1862, *ss.* 95, 96, 133, *sub-s.* 7, 149, 151 [*Revised Ed. Statutes, vol. xiv., pp.* 223, 224, 232, 234, 235]—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 12.

The Court has jurisdiction, by placing restrictions on a voluntary liquidator, or by dispensing with restrictions on an official liquidator, almost to turn a winding-up under supervision into a winding-up by the Court, and a winding-up by the Court into a winding-up under supervision, thus adapting its orders to the exigencies of the particular case before it: *In re London Quays and Warehouses Company* (1), and *In re Rochdale Property and General Finance Company* (2), discussed and adopted.

Though the *Companies (Winding-up) Act*, 1890, has no application to a voluntary winding-up, it can be made use of by the Court for the purpose of placing restrictions on the liquidator's powers, analogous to those which the legislature has now imposed, if the creditors desire it, upon an official liquidator in a winding-up.

Form of order continuing a voluntary winding-up under supervision, subject to the control of a committee of inspection.

PETITION.

W. Watson & Sons, Limited, was incorporated on the 7th of March, 1887, with a nominal capital of £100,000, divided into 10,000 shares of £10 each, for the purpose of acquiring the business previously carried on at *Jewin Crescent, London*, and *Flinders Lane, Melbourne*, under the style of *William Watson & Sons*, General Warehousemen. Most of the shares had been issued as fully paid up. The company got into difficulties, lost its trade capital, and had become largely indebted to its trade creditors.

On the 16th of February, 1891, a petition was presented by a shareholder, who was also a creditor for £4500, asking for a compulsory winding-up.

On the 18th of February, a meeting of some of the principal trade creditors was held, when the circumstances which had led to the filing of the petition were explained and discussed, and a

(1) Law Rep. 3 Ch. 394. (2) 12 Ch. D. 775.

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resolution passed: "That a committee be appointed to watch over and take such action as may be advisable, for the protection of the interests of the creditors, with relation, as well to the acceptance and effectuating of a composition arrangement or the winding-up of the company, as to other matters affecting the general interests of the creditors."

"That" [here followed the names of five creditors] ("three to be a quorum") be the committee, with power to avail themselves of professional assistance, the creditors agreeing to bear rateably such incidental expenses as may not be borne by the company or payable out of its assets."

The committee thus appointed, convened a general meeting of the creditors for the 24th of February, to determine as to the course to be taken on the petition for winding-up. At this meeting it was stated, that the shareholders proposed to pass an extraordinary resolution for winding up the company voluntarily, with a Mr. *Miles* as liquidator, and after some discussion, the following resolution was adopted: "That this meeting adopt and confirm the resolutions of the principal trade creditors on the 18th inst., and that upon the information laid before it, this meeting is of opinion that it is advisable, in the interest of the unsecured creditors, that the voluntary winding-up of the company should be continued under the supervision of the Court, with Mr. *Miles* as sole liquidator, provided that the committee of creditors, or a majority of it, be appointed by the Court to represent the unsecured creditors in the winding-up, with the powers it would have, if it were a committee of inspection under the *Companies (Winding-up) Act*, 1890, or that such other directions be obtained from the Court, as in the opinion of the solicitor for the committee will afford to the committee due facilities for representing and protecting the interests of the unsecured creditors in all matters in the winding-up affecting them."

This resolution was signed and approved by creditors for sums amounting in the aggregate to £41,500.

On the 25th of February, the extraordinary resolution to wind up the company voluntarily, with Mr. *Miles* as liquidator, was passed.

The total indebtedness of the company was about £100,000. The petition for winding-up compulsorily now came on for hearing.

Byrne, Q.C., and *Eve*, for the petition, asked for a compulsory winding-up.

Farwell, Q.C., and *C. E. Jenkins*, for trade creditors amounting to £41,500:—

We ask that the voluntary winding-up may be continued under supervision with a committee, consisting of the five creditors already chosen, and for whom we can also appear, to control and assist the liquidator. This committee would be analogous to the committee of inspection provided for by the *Companies (Winding-up) Act*, 1890, s. 9.

Under sect. 151 of the *Companies Act*, 1862, the Court can impose restrictions on the powers exerciseable by the liquidator in a voluntary winding-up under supervision. The restriction we ask is the sanction of the committee of inspection. That the Court has jurisdiction to impose restrictions is clear: *In re London Quays and Warehouses Company* (1); *In re Rochdale Property and General Finance Company* (2). If the order is made as suggested, the committee ought to be allowed a separate set of costs.

Alexander, for secured creditors for £22,500 and for unsecured creditors for £1300, supported the application for a winding-up under supervision with a committee of inspection.

Oswald, for unsecured creditors for £2900:—

The company has lost all its capital, its business has been mismanaged, and the circumstances of the case require a strict investigation of the company's affairs. A more searching investigation can be made under the *Companies (Winding-up) Act*, 1890, than can be had in a voluntary winding-up. If I shew a case of suspicion, as I submit I do in this case, that ought to turn the scale in favour of a compulsory winding-up. I wish to have the full benefit of the provisions of the new Act, and ask

(1) Law Rep. 3 Ch. 394. (2) 12 Ch. D. 775.

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for a compulsory order; though, if I cannot get that, I will accept an order in the form suggested by the trade creditors.

Ribton, for foreign creditors for £1300:—

I also wish for a compulsory winding-up. If the order is made in the form suggested by the trade creditors it will be a delegation of the powers of the Court to a committee of inspection. I would rather have the petition dismissed than accept an order in the form suggested by the trade creditors.

Micklem, for the company.

Byrne, in reply, stated that the Petitioner would be content to take an order continuing the winding-up under supervision with a committee as suggested by the trade creditors.

CHITTY, J. (after stating the facts, and the wishes and contentions of the different sets of creditors, continued):—

It is plain in a question of this kind, that the Court may have regard, under the 149th section, to the wishes of the creditors, and I think I ought to give great weight to the wishes of so large a majority as that which I have before me asking for a voluntary winding-up under supervision. It was said that the company has been carrying on its business at a loss (and this formed the staple of Mr. *Oswald's* argument), and, consequently that there was a case of suspicion, and a case requiring investigation. I am not satisfied that the affidavit filed in support of this contention does present any such case as Mr. *Oswald* attempted to raise in his argument at the Bar. The company has been unfortunate; but it is not enough, on this question of balancing the wishes of the majority and the minority of the creditors, to say: "Inasmuch as there have been losses, we have a suspicion there is something wrong"; that will not do, for although the Court does not require a case of misfeasance or maladministration to be proved with the utmost strictness, it will not act, when balancing the wishes of one portion of the creditors against that of another, upon suspicion, or upon a mere assertion that the affairs of the company require investigation.

What is required is, that a strong *primâ facie* case should be made out, and although it is plain that under the Act of 1890 there are provisions whereby a more searching investigation can be made than there were in the Act of 1862, yet I think the Act of 1890 has made no alteration whatever in the principles upon which the Court acts in reference to the matter which I am now considering. Therefore, if I have jurisdiction, I think that on the facts, it would be right to make such an order as is asked for by the majority. But Mr. *Ribton* argued, that if that were done, it would be a delegation of the powers of the Court. I am of opinion that the order I propose to make, neither in form nor in substance, will amount to anything of the kind; I treat the case as if the Act of 1890 had not been passed, mentioning, by-the-way, that the 31st section of the Act shews that the Act does not apply to a winding-up under the supervision of the Court. Under the 151st section of the Act of 1862, it is provided that: "Where an order is made for winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily." That enables the Court to impose restrictions upon the exercise of the liquidator's powers. The nature of the restrictions is not defined; apparently it is left entirely to the discretion of the Court to say what the restrictions, if any, shall be. In *In re London Quays and Warehouses Company* (1), the Lords Justices, *Cairns* and *Selwyn*, imposed on the voluntary liquidator the same restrictions as an official liquidator would be subject to in a compulsory winding-up, except so far as the Court should think fit to dispense with those restrictions. That is an authority for the exercise of the jurisdiction imposing restrictions. Now, turning to the 133rd section, I find under sub-sect. 7, "The liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator." Turning to the 95th section, which confers powers on the official liquidator, I find that there are restrictions placed upon the exercise of certain

(1) Law Rep. 3 Ch. 394.

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powers, the 95th section being completed by the 96th, which provides that: "The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court," and in the *Rochdale Property and General Finance Company* (1), the Court made an order giving the official liquidator power to do all acts without the previous sanction of the Court, thus giving to a compulsory winding-up the effect of winding-up under supervision. That is the converse case to the case of *In re London Quays and Warehouses Company* (2). These cases are of use as shewing that the Court has jurisdiction, and has exercised the jurisdiction which, for practical purposes, turns the winding-up by the Court very nearly into a winding-up voluntarily under supervision, and, *vice versâ*, it turns a winding-up under supervision almost into a winding-up by the Court. It appears to me that that jurisdiction so conferred upon the Court by the Legislature is conferred usefully, since it enables the Court to adapt its orders to the exigencies of the particular case that may be before it. Committees of inspection have been formed to assist the liquidator where the winding-up has been by the Court, and that is within the jurisdiction of the Court. In the case of the *Oriental Bank*, I appointed a consultative committee, that is to say, a committee whom the liquidator could consult if he chose. That was not an authoritative committee; and, of course, in no sense was that a delegation of the powers of the Court, and I believe, although I have not had time to find the precedent, that in cases of the winding-up of companies whose assets were very large, there were similar cases to be found in the Rolls Chambers (3); but I do not propose, in any order I make, to appoint a committee. That the committee of inspection is a useful and desirable body I think is shewn by the Act of 1890, although the Act of 1890, as I have said, has no application to a voluntary winding-up; but the enactments contained in that statute can be made use of by the Court officially, for the purpose, not of appointing a committee, but for the purpose of placing restrictions upon the

(1) 12 Ch. D. 775.
(2) Law Rep. 3 Ch. 394.
(3) See order in the *London, Hamburg and Continental Exchange Bank, post*, 61.

liquidator's powers, similar to those which the Legislature has thought ought to be imposed upon a liquidator under a winding-up, where the body of creditors desired it. All I mean is, that the statute of 1890 affords a useful analogy—beyond that I do not go.

The result is, that I think I can frame an order which will neither in form nor in substance be a delegation of the powers of the Court. The order must be drawn carefully. And I will myself see the minutes before it is finally settled. [His Lordship then stated the basis on which he considered the minutes ought to be framed, and continued:—]

My Chief Clerk, Mr. *Hawkins*, has been good enough to find an order of the 22nd of April, 1865, in the *London, Hamburg and Continental Exchange Bank, Limited*, which, after directing the bank to be wound up, and appointing two joint official liquidators, appointed one *John Bell* "to represent (five named persons), the committee of shareholders appointed by a resolution of the company at an extraordinary general meeting held on the 21st of April, 1865, on all questions affecting the directors or the past administration of the bank, which may arise out of the investigation to be completed by the said committee of shareholders pursuant to such resolution. Such committee, by the said *John Bell*, as their representative to be at liberty to apply to the Judge in Chambers in relation to any such matters, as occasion may require." That order apparently was made under rule 61 of General Order, November, 1862, by which the Judge may appoint any one or more of the contributories or creditors to represent any class of contributories or creditors, on any question in the winding-up. I had this rule in my mind before, though I did not mention it in the earlier part of my judgment, as being another way in which the order I propose to make could be founded on principle, that is to say, that this committee of five persons after all, are only representatives of creditors. It is not worth while to travel further through the various sections of the *Companies Act*, 1862, to shew that in a voluntary winding-up under supervision the Court has jurisdiction to do the same things that it can do in a winding-up by the Court; but I am glad the precedent has been found, as I was quite sure that the

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thing had been done. It was recognised again by Sir *George Jessel* in 1879, when he made an order giving leave to the liquidators to pay this committee a certain sum each for their remuneration.

Mar. 10. The minutes of the order were submitted to the Court, and the material parts of it, as sanctioned by the Judge, were as follows:—

Order that the voluntary winding-up of the above-named company be continued, but subject to the supervision of this Court; and any of the proceedings under the said voluntary winding-up may be adopted as the Judge shall think fit. And the persons hereinafter named by their counsel consenting to act in manner hereinafter mentioned, and without remuneration: this Court doth direct that the liquidator appointed to conduct such winding-up may exercise all the powers conferred upon him by the above statutes without the sanction or intervention of this Court in the same manner as if the company were being wound up altogether voluntarily, subject until further order to the restrictions hereinafter imposed upon him, that is to say,

(*a.*) The liquidator shall not without the sanction of a majority of the following persons (here followed five names), being the persons nominated by the creditors of the company to act as a committee, or of the Court, carry on the business of the company, or bring or defend any legal proceedings or exercise any of the powers conferred by sect. 159 or sect. 160 of the *Companies Act*, 1862.

(*b.*) The liquidator shall not without the sanction of a majority of the aforesaid persons, or of the Court, sell or enter into any contract for the sale of the company's business.

(*c.*) The liquidator except in cases of urgency, shall not without the sanction of a majority of the aforesaid persons or of the Court, employ a solicitor or other agent to take any proceedings or do any business which the liquidator is unable to take or do himself.

And the liquidator is to be at liberty to pay, out of the assets of the company, the actual out-of-pocket expenses necessarily incurred by the aforesaid persons acting as aforesaid, subject to the approval of the Judge in Chambers.

Liberty to apply in chambers in the event of any of the aforesaid persons dying or retiring.

General liberty to the creditors, contributories and liquidators to apply.

Direct the costs of the petitioners and of the company, and of the said creditors supporting the petition to be taxed and paid out of the assets of the company, and on such taxation one set of costs is to be allowed to (the five persons forming the committee), and one set of costs to all the other creditors supporting the petition.

Solicitors: *W. Sturt; C. A. Bannister; Poole & Robinson; J. G. Shearman; Piesse & Son.*

W. C. D.

In re DE PENNY. DE PENNY *v.* CHRISTIE.

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1891

March 13, 21.

[1891 D. 196.]

Practice—Writ—Service out of the Jurisdiction—Rules of Supreme Court, 1883, *Order* XI., *r.* 1 (*f*), *r.* 2.

D. P., who was born in *Scotland* in 1831, was from the year 1856 to the time of his death in 1890 mostly resident in *Bolivia*. In 1882 he married the Plaintiff, a native of *Bolivia*. In 1886 he returned to *Scotland*, where he purchased an estate; and, in 1888, again returned to *Bolivia*. In May, 1890, he died in *Bolivia*, being then on his way to return to *Scotland*.

The Plaintiff, claiming to be the wife of *D. P.*, procured from the Bolivian Court, *ex parte*, a declaration of the deceased's intestacy, and that she was entitled to his moveables, including the moveable or personal property in *England*.

D. P.'s next of kin, who were his four sisters, claiming that at his death the intestate was domiciled in *Scotland*, obtained *ex parte* from the Court of *Aberdeen* a confirmation of their title, finding that the deceased died domiciled in *Scotland*, and appointing them executrices dative of the deceased; and, pursuant to such decree, they delivered an inventory of the personal estate of the intestate in both *England* and *Scotland*, in accordance with the *Confirmation and Probate Act*, 1858, and found security for the administration of the intestate's personal estate, the greater part of which was in *England*, and consisted of a sum of 36,000*l.* in the hands of *G. & S.*, who had been *D. P.'s* agents, and were the holders of a power of attorney from the Plaintiff to prosecute actions here. The personalty in *Scotland* was of the value of 3000*l.*

Pursuant to the above Act of 1858, the confirmation so obtained in *Scotland* was sealed by the Probate Court here, notwithstanding that a caveat had been entered on behalf of the Plaintiff, and the four sisters of the deceased thereby became the duly constituted legal personal representatives of the intestate in *England*. It was, however, intended to institute proceedings on the Plaintiff's behalf in *Scotland* for the revocation of the Scotch confirmation.

This action was commenced against the executrices dative and *G. & S.*, and the Plaintiff claimed a declaration that the deceased died domiciled in *Bolivia*, administration, an injunction to restrain *G. & S.* from paying over the funds in their hands to the executrices, or otherwise parting with them except to the Plaintiff, an injunction to restrain the executrices from taking proceedings to recover, and from receiving the intestate's personal estate, and a receiver.

The writ was duly served on *G. & S.* in *London*, and the Plaintiff had, under Order XI., r. 1 (*f*), obtained an order for service of the writ out of the jurisdiction on the executrices:—

Held, on motion by the executrices to discharge the order for service,

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that, although the Court would on a motion supported by proper evidence be justified in granting an injunction to restrain the executrices from suing *G. & S.* within the jurisdiction, as such an injunction would be an injunction to restrain a thing being done within the jurisdiction, and consequently within rule 1 (*f*) of Order XI., yet, under all the circumstances of the case, and particularly as the Scotch Courts had already to some extent seisin of the case, and the Plaintiff intended to institute further proceedings in *Scotland*, the order for service ought not to stand and must be discharged.

A remedy which depends on the will and pleasure of another person is not a concurrent remedy within rule 2 of Order XI.

MOTION.

This was a motion to discharge an order for service of the writ out of the jurisdiction.

The facts and the arguments fully appear from the judgment.

Rigby, Q.C., *Birrell*, and *A. E. Barker*, in support of the motion.

Sir *Horace Davey*, Q.C., and *Sillem*, for the Plaintiff.

[The following cases were referred to in the course of the argument: *British Marine Association* v. *MacInnes* (1); *Ewing* v. *Orr-Ewing* (2); *Société Générale de Paris* v. *Dreyfus Brothers* (3).]

March 21. CHITTY, J.:—

This is a motion to discharge an order for service out of the jurisdiction by the Defendants, the sisters of the intestate, who are domiciled and resident in *Scotland*.

The intestate at his death, which occurred in *South America* after he had started on a journey to *Scotland*, was entitled to a large fortune consisting of immoveable and moveable property. The greater part of it was at his death in *Bolivia*; part, consisting of moveable or personal property, was in *England* in the hands of the Defendants, Messrs. *Gibbs*, and amounted to £36,000, or thereabouts; the rest was in *Scotland*, consisting of £3000 or thereabouts in moveables and of real estate which he had recently purchased there.

(1) 31 Sol. J. 95. (2) 10 App. Cas. 453.
(3) 29 Ch. D. 239; 37 Ch. D. 215.

The Plaintiff is a Bolivian lady, domiciled and resident in *Bolivia*. She claims to be entitled to the whole of the intestate's moveables wheresoever situate. Her claim is founded on the following allegations of fact: First, that at his death the intestate was domiciled in *Bolivia*; secondly, that she is his widow; and, thirdly, that, according to the law of *Bolivia*, she is entitled to his moveables, including the moveable or personal property in *England*.

Of these facts the Defendants, the sisters, deny the first and the second, and they deny or do not admit the third.

Her claim is supported by the affidavit of the managing clerk of her solicitors here, founded on documents which have been transmitted from *Bolivia*. From this evidence it appears that her title has been recognised by some tribunal in certain proceedings instituted by her in *Bolivia*. These proceedings were *ex parte*, and not binding on the Defendants, the sisters. Such recognition of her rights as has taken place in *Bolivia* is relied on merely for the purpose of shewing that she has a *primâ facie* title. No objection was taken by the counsel for the sisters on the ground that she had not made an affidavit, nor as to the sufficiency of the evidence for the above limited purpose.

Her case, then, is that she is absolutely entitled in equity to the fund which is now within the jurisdiction of this Court; and she asks that the fund may be kept here until she has had an opportunity of establishing her title. She alleges that the sisters are in poor circumstances, and that they intend, if they receive the fund, to take it out of the jurisdiction of this Court and to distribute it among themselves as the intestate's next of kin in prejudice of her right, and that if they remove the fund she will be without remedy and unable to obtain restitution thereof. At the same time, her counsel disclaimed any imputation of bad faith or dishonesty on the part of the sisters.

The sisters' case is this—they claim that at his death the intestate was domiciled in *Scotland*, the land of his birth; and (as already stated) they deny that the Plaintiff is his widow. They allege that they are his next of kin, and, as such, entitled to his moveables wheresoever found. They have accordingly applied to the proper tribunal in *Scotland* for a confirmation of their title,

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and have obtained there a finding that the deceased died domiciled in *Scotland*, and they have been decerned there to be "the executrices dative" of the intestate. They accordingly represent the intestate in *Scotland*, and are entitled to recover and receive his moveables there. Pursuant to this decree they have duly delivered an inventory of the personal estate of the intestate in both *England* and *Scotland*, in accordance with the *Confirmation and Probate Act*, 1858 (21 & 22 Vict. c. 56), as amended by the *Sheriff Courts* (*Scotland*) *Act*, 1876 (39 & 40 Vict. c. 70), and they have also found caution or security for the due administration of the intestate's personal estate in *England* and *Scotland*.

These proceedings in *Scotland* were also *ex parte*, and were conducted in the absence of the Plaintiff, just as her proceedings in *Bolivia* were conducted in the absence of the Defendants, the sisters. In neither case are the absent parties bound, subject only to the point to be presently mentioned turning on the effect of the *Confirmation and Probate Act*, 1858.

Having obtained this confirmation in *Scotland*, the sisters applied, pursuant to the above Act of 1858, to the Probate Division of the High Court in *England*, to have the confirmation sealed in *England*. Here they were met by a caveat which had been entered on behalf of the Plaintiff. On an appeal from the Registrar, Mr. Justice *Butt* ordered the confirmation to be sealed, but declined to stay contentious proceedings. The confirmation has accordingly been sealed. The result is that the sisters are the duly constituted legal personal representatives of the intestate in *England*, and, as such, entitled to sue for and recover in the English Courts the personal estate of the intestate within their jurisdiction; consequently, they can recover by action in *England* the debt or fund in the hands of the Defendants, Messrs. *Gibbs*, which those Defendants admit to be due.

Sect. 9 of the *Confirmation and Probate Act*, 1858, makes the finding in *Scotland* that the deceased died domiciled there conclusive; but this section, as explained by sect. 17, makes the finding conclusive for the purposes of the Act only: *Hawarden* v. *Dunlop* (1); *Ewing* v. *Orr-Ewing* (2). I understand that the reason why the sealing was ordered here, notwithstanding the caveat,

(1) 5 L. T. (N.S.) 765. (2) 10 App. Cas. 453, 512.

was that the finding in *Scotland* was conclusive on the question of sealing, and that until such finding was duly reversed by the proper tribunal the English Court was bound to allow the sealing.

The relief which the Plaintiff seeks by her writ in this Court is—first, a declaration that the intestate died domiciled in *Bolivia,* and that she is absolutely entitled to the whole of his personal or moveable estate as his widow; secondly, administration of his estate; or, at all events, of so much of it as is within the jurisdiction of the Court; thirdly, an injunction to restrain the Defendants, Messrs. *Gibbs,* from paying over the funds in their hands to the sisters or otherwise parting with the same except to the Plaintiff, and an injunction to restrain the Defendants, the sisters, from taking proceedings to recover and from receiving the intestate's personal estate, or any part thereof; and, fourthly, for a receiver of the intestate's personal estate within the jurisdiction.

The Defendants, Messrs. *Gibbs,* are friendly to the Plaintiff; in fact, some members of that firm have received from the Plaintiff a power of attorney from her, and it is upon instructions given by them as such attorneys that this action has been instituted in her name. So far as this action is concerned, they are mere stakeholders.

In these circumstances, it is plain that the Plaintiff is claiming, by an equitable title depending on the law of the alleged Bolivian domicil, to be the sole beneficiary, at least of the funds within the jurisdiction of this Court. In the old Court of Chancery, when on the granting of letters of administration the Ecclesiastical Court had by a definitive sentence in a contentious suit determined the question which of the parties were next of kin, such sentence was held to be conclusive in a suit for the administration of the estate, and it was not permissible to reopen the question on the distribution of the estate: *Barrs* v. *Jackson* (1). But where the administration had been granted by the Ecclesiastical Court in a non-contentious proceeding, the grant was not conclusive: *Long* v. *Wakeling* (2). I think, therefore, that the Plaintiff was not precluded by the sealing of the confirmation from suing in

(1) 1 Ph. 582. (2) 1 Beav. 400.

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this Court. Indeed, this point was admitted by the sisters' counsel.

The effect of the sealing of the confirmation in this country, taken in connection with the *ex parte* finding of the domicil in *Scotland*, is to render the representation and administration here ancillary to the representation and administration in *Scotland*. But it has been the practice of the Courts in all countries to retain assets within their jurisdiction for the purpose of ensuring payment of the debts of creditors within the jurisdiction, and not to permit the assets to be taken away until such creditors are paid, and only after they are paid to allow the surplus assets to be remitted to the principal administrator in a foreign country. In the *Société Générale de Paris* v. *Dreyfus Brothers* (1), Mr. Justice *Pearson* held that the plaintiffs, foreigners out of the jurisdiction, were entitled to restrain the defendants, also foreigners out of the jurisdiction, from removing out of the jurisdiction funds to which the plaintiffs claimed to be entitled. His judgment was reversed on appeal, on the ground that the further evidence adduced shewed that the matter was *res judicata* between the parties by reason of the judgment of the French Courts having jurisdiction in the matter (2).

The exact point for decision in this case turns upon Order XI. of the Rules of 1883. This order contains the code of English law and procedure upon the question of service out of the jurisdiction. The only parts of the order on which the Plaintiff can rely are sub-sects. (*f*) and (*g*) of rule 1. As to sub-sect. (*g*), the Plaintiff's counsel did not argue that the case fell within it. I need, therefore, say no more about that sub-section than that I think it does not apply. Sub-sect. (*f*) enables the Court to allow service out of the jurisdiction where "any injunction is sought as to anything to be done within the jurisdiction." For the sisters it was argued that the thing to be done must be something which could be done only or exclusively within the jurisdiction, and that inasmuch as the injunction asked was to restrain payment by the Defendants, Messrs. *Gibbs*, anywhere, and to restrain the sisters from suing or receiving anywhere, the case was not within the rule. But, although the

(1) 29 Ch. D. 239. (2) 37 Ch. D. 215.

injunction asked for is in wider terms than it would be right to grant it, I think that on a motion supported by proper evidence the Court would be justified in granting an injunction restraining the sisters from suing Messrs. *Gibbs* within the jurisdiction; and such a limited injunction would be an injunction to restrain a thing being done within the jurisdiction, and consequently within the rule. As the evidence stands at the present moment, the sisters could sue Messrs. *Gibbs* only within the jurisdiction and consequently, as Messrs. *Gibbs* are friendly to the Plaintiff, and not willing to pay the sisters unless compelled so to do by action, such an injunction would be effectual. The case, then, is not within the principle of the decision in the *British Marine Association* v. *MacInnes* (1), where Mr. Justice *Manisty*, so far as appears from the short note of his judgment, thought that the injunction would not be effectual. I am of opinion, then, that the Plaintiff is right on this point, and that the Court had authority to order service out of the jurisdiction.

But there remain for consideration, first, the question arising on the 2nd rule of Order XI., which requires that, where leave is asked to serve a writ in *Scotland*, if it shall appear to the Court that there may be a concurrent remedy in *Scotland*, the Court shall have regard to the comparative convenience of proceeding in *England*, or in the place of residence of the Defendants; and also, secondly, the question of the proper exercise of the judicial discretion in allowing service out of the jurisdiction: *Société Générale de Paris* v. *Dreyfus Brothers* (2). These questions I will consider together.

Assuming that there is a concurrent remedy in *Scotland*, it will be unquestionably more convenient to the Defendants, the sisters, who are resident in *Scotland*, that the proceedings should take place there; and, inasmuch as the Plaintiff resides in *Bolivia*, it will make but little difference to her convenience whether the proceedings are in *England* or in *Scotland*, although it would be slightly more convenient to her that the proceedings should be here, where her lay attorneys and her present professional advisers are resident. But it is said for her, that the balance of convenience is in favour of suing in *England*, because the fund is here. Now,

(1) 31 Sol. J. 95. (2) 37 Ch. D. 215.

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I think this would be a strong ground in her favour if the Defendants, the sisters, proposed to take the funds, which are here, not merely out of the jurisdiction, but to some foreign country. But on the evidence as it stands the only case made for the Plaintiff is that the sisters intend to take the fund to *Scotland*; but there is no reason for supposing that they intend to fly from their native land with the money if they receive it. Further, they have given security in *Scotland* for the due administration of the intestate's estate in pursuance of the *Confirmation and Probate Act*, 1858—a statute which applies to both *England* and *Scotland*. The main contest between the parties is as to the domicil. The intestate was a Scotchman by birth, and, although there is no very precise evidence on the point, the probability is that several of the witnesses are in that country. Certainly the intestate's agent and factor, who has made an affidavit as to the Scotch domicil and will be a material witness, resides in *Scotland*. Although I do not pretend to review the finding in *Scotland* that the domicil was Scotch, and I am aware the Plaintiff has not as yet had a fair opportunity of giving evidence as to the domicil, and although it would be premature to express any definite opinion on the question, I may, without impropriety, go so far as to say that upon the letters of the intestate, written within a short time before his death, upon the fact of his having recently bought an estate in *Scotland*, and the other facts deposed to, there is a fair *primâ facie* case shewn for the Scotch domicil. But when I say this, I must not be understood as meaning in any way to prejudice the Plaintiff's case. My conclusion is, that on the question of convenience the preponderance is in favour of *Scotland*.

But is there a concurrent remedy? The suggestion on behalf of the sisters is that Messrs. *Gibbs*, as the stakeholders, may institute in *Scotland* an action of multiplepoinding, an action analogous to interpleader in England, the result of which would be that the fund would be deposited in a bank there, and the litigation would proceed between the Plaintiff and the sisters. But although the Defendants, Messrs. *Gibbs*, may be willing to assist the Plaintiff to some extent, they may not be willing, and they certainly are under no obligation to her, to

incur the trouble and expense of instituting proceedings in their own names on their own behalf in *Scotland*. A remedy which depends on the will and pleasure of another person is not a concurrent remedy within the 2nd rule of Order XI.

There remains, however, to be mentioned one fact which, in connection with the other circumstances of the case, is, I think, decisive on the question of the proper exercise of the judicial discretion. It is this. From the affidavit in support of the Plaintiff's case it appears that it is intended to institute proceedings on her behalf in *Scotland* for the revocation of the Scotch confirmation. These proceedings will go to the root of the matter. If the Plaintiff succeeds, the revocation of the sealing in England will follow, and the Plaintiff will thus become the legal personal representative in *Scotland* and in *England* of the intestate. In any view of the case she must have recourse to the Scotch Courts to establish her claim to the moveables there. Considering, then, that she must take proceedings in *Scotland*; that there is no substantial risk of the English personal estate being lost to her if removed to *Scotland*, and that security has been given there for the due administration of the entire estate in both countries, and considering that the Scotch Courts have to the extent above stated seisin of the case, I come to the conclusion that the service in *Scotland* ought not to stand. The Bolivian lady ought not to be allowed to draw the Scotch ladies across the border into the English Courts, but must pursue them in the Courts of their own country, which have jurisdiction to do her complete justice. I, therefore, accede to the application, and discharge the order for service out of the jurisdiction.

Solicitors: *Keeping & Gloag; Budd, Johnsons, & Jecks.*

G. M.

CHITTY, J.
1891
March 23

LAWRENCE *v.* EDWARDS.

[1890 L. 2818.]

Office of Parish Clerk—Temporal or Spiritual.

The office of parish clerk is a temporal office.

THE facts of this case have been fully reported (1).

The action now came on upon motion for judgment in default of defence.

The minutes asked for a declaration that the plaintiff was the legally appointed parish clerk for the parish of *Eversley*, and entitled to all fees belonging to such office, and for a perpetual injunction, restraining the Defendant from acting or purporting to act as parish clerk in virtue or under colour of his alleged appointment, or interfering with the Plaintiff in the execution of his office, so long as the Plaintiff should continue to be parish clerk, and from receiving the fees, and for delivery over of all books and keys (if any) which belonged to the parish clerk by virtue of his office, and which were in the possession or under the control of the Defendant.

The Defendant did not appear.

Willis Bund, for the Plaintiff:—

The only question is whether the office of parish clerk is a temporal or spiritual office. The authorities go to shew that it is a temporal office.

[He referred to *Townsend* v. *Thorpe* (2); *Peak* v. *Bourne* (3); *Tarrant* v. *Haxby* (4); *Parish Clerk* (5).]

CHITTY, J.:—

From the authorities which have been cited, and which extend from the time of King *James* I. to more recent times, it appears to be well settled that the office of parish clerk is a temporal office, and this Court has, therefore, jurisdiction in the matter, and I make the order as asked for by the minutes.

Solicitors: *Withall, Holland, & Withall.*

(1) [1891] 1 Ch. 144.
(2) 2 Str. 776.
(3) 2 Str. 942.
(4) 1 Burr. 367.
(5) 13 Rep. 70.

G. M.

COXON *v.* GORST.

CHITTY, J.

1891

April 15, 21.

[1890 C. 4187.]

Company—Winding-up—Dissolution—Action by Creditor against Directors—Fraud—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 111 [*Revised Ed. Statutes, vol. xiv., p.* 226.]

After a company had been wound up under a compulsory order and dissolved under sect. 111 of the *Companies Act,* 1862, a creditor commenced an action against the late directors and official liquidator, seeking to make the directors liable for the alleged payment of dividends out of capital while the company was a going concern, or, at any rate for the dividends received by themselves, but not alleging fraud:—

Held, on motion to strike out the statement of claim on the ground that it disclosed no reasonable cause of action, that the dissolution was, in the absence of any fraud being alleged, an absolute bar to the action.

MOTION.

Edwin Fox & Co., Limited, were incorporated in 1882, and under an order of the 14th of January, 1888, the company was wound up and an official liquidator appointed, who, on the 13th of March, 1890, obtained an order under sect. 111 of the *Companies Act,* 1862, whereby the company was dissolved from that date.

The Plaintiff, who was a creditor of the company at the date of the winding-up order, commenced this action against the directors of the company and the official liquidator, and by his statement of claim alleged that no profits available for dividend were ever made in any year by the company; that the Defendants had made various payments of dividends out of the funds of the company, and had themselves received part of the dividends so paid in respect of shares held by them; that at the date of the winding-up order the liabilities of the company exceeded the assets, and that the whole of such assets upon the making of the winding-up order became the property of the creditors of the company, subject to the expenses of the liquidation; that the right of the company to recover from the Defendants sums paid as dividends was a *chose in action* part of the property of the company, and that in any event the sums received

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by the Defendants as and for dividends upon their shares were assets of the company; that in March, 1888, at a meeting of the creditors of the company, certain persons were appointed a committee to advise the official liquidator in the conduct of the business of the company; but that the liquidator, without the knowledge or consent of such committee, applied for and obtained the order for dissolution; and the Plaintiff claimed a declaration that the Defendants, the directors, were jointly and severally liable to pay to the persons who were creditors of the company at the time of its dissolution the above-mentioned sums, or the latter of them, and an inquiry as to who were such creditors.

The Defendants, by their statement of defence, denied the allegations contained in the statement of claim, and stated that the affairs of the company had been completely wound up, and that all its available assets had been got in and accounted for.

Before the delivery of the defence, notice of motion was given on behalf of the Defendants that the statement of claim might be struck out on the ground that it disclosed no reasonable cause of action, and that all further proceedings in the action might be stayed, or in the alternative that all further proceedings might be stayed as frivolous and vexatious and an abuse of the process of the Court.

This motion now came on to be heard.

Byrne, Q.C., and *Stock*, in support of the motion:—

There is no jurisdiction to wind up a company which has been dissolved under the provisions of sect. 142 of the *Companies Act*, 1862, unless the dissolution can be impeached on the ground of fraud, and this action is in effect for that purpose. The provisions of the Act as to dissolution would be of very little value if a creditor could, after the period of three months prescribed by the Act, come and open the whole matter: *In re Pinto Silver Mining Company* (1); *In re London and Caledonian Marine Insurance Company* (2). The same rule must apply to a company wound up under the Court. A creditor cannot restrain a company from making away with its assets except by petitioning

(1) 8 Ch. D. 273. (2) 11 Ch. D. 140.

for a winding-up order: *Mills* v. *Northern Railway of Buenos Ayres Company* (1).

The *Companies Act*, 1880, expressly reserves by sub-sect. 4 of sect. 7 the liability of directors of a company which has been dissolved by being struck off the register—which shews that otherwise such liability would be extinguished by the dissolution.

Macnaghten (*Byrne*, Q.C., with him), for directors in the same interest.

Farwell, Q.C., and *W. F. Hamilton*, for the Plaintiff:—

The dissolution of a company does not deprive the Court of its jurisdiction over such company: *In re Crookhaven Mining Company* (2).

[CHITTY, J.:—That *dictum* is contrary to the later decisions.]

Creditors are entitled to have the capital of a company kept for the payment of their claims, whether in pursuance of an express contract by the directors, as in *Evans* v. *Coventry* (3), or under an implied contract or representation to that effect: *In re National Funds Assurance Company* (4).

[CHITTY, J., referred to *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (5)].

A creditor can enforce liability for misfeasance independently of the winding-up, as he is the person interested in the result: *Cavendish Bentinck* v. *Fenn* (6); and his right to recover an outstanding asset ought not to be defeated by the winding-up.

Cases of attempts to wind up a company already dissolved do not apply.

We submit that, at all events, what the directors themselves received can be recovered, as in the case of assets followed in the hands of a legatee, without suing the legal personal representative.

The official liquidator did not appear.

Byrne, in reply.

(1) Law Rep. 5 Ch. 621.
(2) Ibid. 3 Eq. 69.
(3) 8 D. M. & G. 835.
(4) 10 Ch. D. 118.
(5) Law Rep. 6 H. L. 352.
(6) 12 App. Cas. 652.

CHITTY, J. April 21. CHITTY, J.:—

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This action may be disposed of on the short ground that it is barred by the order of the Court in the winding-up whereby the company was dissolved. The Plaintiff purports to sue on behalf of himself and all other the creditors of the company. This is obviously wrong; the company has ceased to exist. If this were a matter of form only, it could be remedied by amendment; but it is a matter of substance. The Defendants are persons who had been or were directors of the company previously to or at the date of the order to wind up and the person who was the official liquidator of the company down to the order dissolving the company.

The object of the action is to recover assets of the late company alleged not to have been got in pending the winding-up, and to have such assets distributed among the Plaintiff and the others on whose behalf he is suing. In other words, it is an action for a further and complete winding-up of the affairs of the company.

The assets sought to be recovered are the sums alleged to have been wrongfully paid by the directors out of capital by way of dividend. In fairness to them, it ought to be stated that they are not charged with fraud in making the alleged payments; the only charge against them is that they did not take proper precautions before the dividend was paid to ascertain that the capital would be left intact. Such a claim might have been made in the winding-up under the 165th section of the Act of 1862. So far as anything to the contrary appears in the amended statement of claim, the question of the liability of the directors may have been duly considered in the winding-up. No relief is sought against the late liquidator, except possibly costs.

Such, then, is the relief sought in an action in which an attempt is made to impeach the order dissolving the company. The only allegation against the order is the immaterial statement that it was made without the knowledge or consent of an informal committee of creditors, who had no authority by statute or otherwise. Where in a voluntary winding-up the company has been dissolved, pursuant to sect. 142 of the *Companies Act*, 1862, it

has been decided by the Court of Appeal that the Court has no jurisdiction to make an order on petition for winding up by the Court unless the dissolution can be impeached on the ground of fraud: *In re Pinto Silver Mining Company* (1); *In re London and Caledonian Marine Insurance Company* (2). These decisions apply in full force to a dissolution by order of the Court in a winding-up by the Court. Consequently the Plaintiff, who does not even allege fraud, could not proceed by petition for a discharge of the order of dissolution and for a continuance of the winding-up by the Court. But it is argued that he is at liberty to proceed by an action in which he does not impeach the order of dissolution. In my opinion, he cannot. Putting fraud aside, the creditors of a company are bound by the proceedings in a winding-up and the orders made therein. The 111th section of the *Companies Act*, 1862, enacts, that "when the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly." The 66th rule of the General Order of November, 1862, directs that, when the official liquidator has passed his final account, and the balance (if any) due thereon has been paid, a certificate shall be made by the Chief Clerk that the affairs of the company have been completely wound up; and that, in case the company has not been already dissolved, the official liquidator shall, immediately after such certificate shall become binding, apply to the Judge for an order that the company be dissolved from the date of the order. The amended statement of claim does not mention any certificate; but it must be presumed, in the absence of any statement to the contrary, that the order for dissolution in this case was rightly obtained.

According to the authorities above cited, a creditor cannot deny that the affairs of the company have been fully wound up where the dissolution is in a voluntary winding-up under sect. 142 and no fraud is alleged: *à fortiori*, he cannot do so where the dissolution is in a winding-up by the Court and no fraud is alleged. The Plaintiff, therefore, being bound by the order, cannot be permitted, whatever be the form of his proceeding, whether

(1) 8 Ch. D. 273. (2) 11 Ch. D. 140.

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by action or petition, to allege that the winding-up is not complete. I must not be supposed to assent to the argument that a creditor can proceed by action to recover from directors capital wrongfully paid away in the shape of dividends where the company still exists; but assuming, notwithstanding Lord *Hatherley's* decision in *Mills* v. *Northern Railway of Buenos Ayres Company* (1), that he can, and assuming that the principle of the decision in *Evans* v. *Coventry* (2), where the Plaintiff there, as one of the assured, had a contract affecting the capital of the insurance company or partnership, would apply, I am of opinion that no such action can be maintained where the company has been dissolved. The Plaintiff cannot sue without making the company a party; and, the existence of the company having been put an end to by the operation of the statute, he cannot sue at all; where the company still exists, the capital wrongfully paid away would have to be restored to the company's coffers if it was a going concern, or paid to the official liquidator or into Court if the company was being wound up by the Court.

The amended statement of claim contains an allegation, possibly with a view to get over this difficulty, to the effect that the right to recover the amount alleged to have been wrongfully paid away is a *chose in action* which on the dissolution of the company passed to the creditors. This supposed vesting in the creditors of the company's *choses in action* is a mere fiction with nothing in the statute to support it, and is in the teeth of the provisions of the statute.

The result is that the affairs of this company have been completely wound up, and the company itself has been duly dissolved. Consequently, the amended statement of claim discloses no reasonable cause of action, and the action must be dismissed as against the moving Defendants with costs.

Solicitors: *Turnbull, Tilly, & Mousir; Newman, Hays, & Co.; Bedford, Monier-Williams, & Robinson.*

(1) Law Rep. 5 Ch. 621. (2) 8 D. M. & G. 835.

G. M.

THYNNE *v.* SARL.

NORTH, J.

1891

Feb. 17.

[1890 T. 665.]

Practice—Foreclosure—Order absolute—Direction for Delivery of Possession—Form of Order—Identification of Property—Writ of Possession—Rules of Supreme Court, 1883, *Order* XLVII., *rr.* 1, 2—*Appendix H, Forms* 7*a*, 8.

An order for the delivery of possession of mortgaged property by the mortgagor to the mortgagee, forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property of which he is directed to deliver possession.

THIS was a foreclosure action, commenced by originating summons. The mortgage was dated the 16th of July, 1888.

On the 8th of May, 1890, an order was made by Mr. Justice *North* in Chambers, directing an account of what was due to the Plaintiffs "under and by virtue of the said indenture of mortgage dated the 16th of January, 1888, and for their costs of this application," and that, in default of the Defendants, or any of them, paying to the Plaintiffs what should be certified to be due to them, within six months after the date of the Chief Clerk's certificate, the Defendants should thenceforth stand absolutely foreclosed "of all equity of redemption in the hereditaments comprised in the said mortgage."

The account was taken under this order, and the Defendants made default in paying the amount found due from them within the time limited. On the 17th of January, 1891, the Plaintiffs took out a summons in Chambers, asking "that the Defendants, and each of them, may be absolutely foreclosed of all equity of redemption in all that piece or parcel of land, situate on the south side of *Victoria Street,* in the parish of *St. Margaret, Westminster,* being the property comprised in the Plaintiffs' mortgage security of the 16th of January, 1888, and that the Defendants may be ordered, within seven days after service of the order to be made hereon upon them, to deliver to the Plaintiffs possession of the said mortgaged land and premises." An order was made

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by the Chief Clerk in accordance with this summons. The minutes of the order, as given out by the Registrar, were thus expressed: "It is ordered that the Defendants do from henceforth stand absolutely foreclosed of all equity of redemption in the hereditaments comprised in the said mortgage. And it is ordered that the Defendants do, within seven days after service upon them of this order, deliver to the Plaintiffs possession of the said mortgaged hereditaments."

When the order was taken by the Plaintiffs' solicitor to the writ department of the central office, for the purpose of obtaining the issue of a writ of possession, the clerk declined to issue the writ, on the ground that the order for delivery of possession did not contain a sufficient identification of the property for the guidance of the sheriff.

Micklem, for the Plaintiffs, now mentioned the matter to the Court:—

The order has been drawn by the Registrar in accordance with the practice of the Chancery Division. It has never been the practice in a foreclosure order to set out a full description of the property, but it has always been referred to as the property "comprised in the mortgage deed." The practice of combining an order for delivery of possession with a foreclosure judgment is new. Order XLVII. of the Rules of Supreme Court, 1883, provides, by rule 1, that "a judgment or order that a party do recover possession of any land may be enforced by writ of possession in manner before the commencement of the principal Act used in actions of ejectment in the superior Courts of Common Law." The Forms Nos. 7*a* and 8, of writs of possession, given in Appendix H to the rules, contain a blank intended for a description of the property of which possession is to be recovered, and in the margin is this note: "Describe premises as in judgment or order." This corresponds with the old practice in common law actions of ejectment.

NORTH, J.:—

I think that, so far as the order directs foreclosure absolute, it ought to follow the terms of the order *nisi*. But, when it

goes on to direct delivery of possession, I can see no objection to adding (after the words "the said mortgaged hereditaments") the words "consisting of all that, &c.," inserting the description of the property contained in the mortgage deed, or so much thereof as is intended to be covered by the order for possession. In fact, I think such a description ought to be inserted in the order, which should clearly indicate the property of which possession is to be delivered; and this is assumed by the form of a writ of possession given in the Appendix H to the rules. It may perhaps be convenient in future to add to the order *nisi* the description of the property contained in the mortgage deed. But this has not been done in the present case, and the order absolute should follow the terms of the order *nisi*.

Solicitors: *Trollope & Winckworth.*

W. L. C.

AYLWARD *v.* LEWIS.

NORTH, J.
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Feb. 20.

[1889 A. 1391.]

Practice—Rules of Supreme Court, 1883, *Order* XVI., *r.* 46—*Mortgage—Foreclosure—Deceased Mortgagor—Representative for the Action.*

The Defendant to a foreclosure action died insolvent before foreclosure absolute; there was no legal representative of his estate; an order was made in Chambers appointing one of his next of kin to represent his estate for the purposes of the action. The Court refused to make the foreclosure absolute in the absence of a properly constituted representative of the mortgagor.

THIS was an action to foreclose certain mortgages of leaseholds executed by *John Lewis,* the Defendant, to *Aylward,* the Plaintiff.

A receiver was appointed in the action, who took possession of part of the property mortgaged, which was let in weekly tenancies.

The Defendant made default in pleading, and on the 5th of February, 1890, judgment for foreclosure *nisi* was pronounced, limiting the time for redemption to six months from the date of the Chief Clerk's certificate. The Chief Clerk made his certificate on the 22nd of February, finding that there would be due

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in respect of the mortgage on the 23rd of November, 1890, a sum of £1580 2*s.* 7*d.*, and giving the 24th of November, 1890, as the day for redemption.

After the certificate was made, the Defendant died insolvent. There was no personal representative of his estate.

By an order, dated the 14th of November, 1890, *Augustus Lewis* (a brother of *John Lewis*, and one of his next of kin) was appointed to represent the estate of *John Lewis* for all the purposes of this action; and it was ordered that the Plaintiff should on or before the 19th of November, 1890, serve *Augustus Lewis* with the order, and that upon such service being effected within the time limited, and, in default of payment by *Augustus Lewis*, as such representative, of the amount certified to be due at the date fixed by the order *nisi*, he should, as such representative, be absolutely foreclosed.

The receiver had in his hands £7 2*s.* 11*d.*, the balance of the sums received and expended by him from the time of his appointment to the present time, which was not included in the account taken by the Chief Clerk.

A motion was now made on the part of the Plaintiff that the receiver might be discharged; that he might be ordered to pay to the Plaintiff the balance of £7 2*s.* 11*d.* in his hands in reduction of the £1580 2*s.* 7*d.*, the amount certified to be due to the Plaintiff on the 23rd of November, 1890, for principal, interest, and costs, and thereupon his recognisances might be discharged; and that unless *Augustus Lewis*, as the person appointed to represent the estate of *John Lewis* for the purposes of this action, should, on the 27th of February, 1891, pay £1572 19*s.* 8*d.*, being the balance of the amount certified to be due after deducting the sum of £7 2*s.* 11*d.*, the said *Augustus Lewis*, as such representative, should be absolutely foreclosed.

Vernon Smith, for the motion:—

The order asked for is the proper order to be made when a sum has been received not included in the Chief Clerk's finding: *Jenner-Fust* v. *Needham* (1).

[NORTH, J.:—I am not satisfied that there is a proper repre-

(1) 32 Ch. D. 582.

sentative of the mortgagor's estate before the Court to enable me to make an order binding the estate. I am not satisfied that the order I made in Chambers was right.]

Order XVI., rule 46, enables the Court to appoint a representative of a deceased Defendant for the purposes of the action, and the Defendant's brother is a proper person for that purpose. Orders for foreclosure absolute have been made in similar cases: *Peat* v. *Gott* (1); *Neal* v. *Barrett* (2).

NORTH, J.:—

I am not satisfied that it was right to make the order I did in Chambers; but if that order was properly made, it does not follow that the estate can now be foreclosed. I am asked to make an order for foreclosure absolute when I have not got the mortgagor's estate here in any way, except in so far that a person has been appointed to represent the estate who may have no interest in it. I am not satisfied with the order appointing him. It may be a right order, as a step in the right direction. I decided long since, following the Court of Appeal, that an insolvent trustee is not a sufficient party to a suit, so that the *cestui que trust* may be bound. I am not satisfied that a person who has not got the mortgagor's estate to pay with properly represents the mortgagor's estate in a foreclosure action; in fact, in my opinion he does not. I will not make an order for foreclosure in the absence of a properly constituted representative of the mortgagor.

Solicitors for Plaintiff: *Bell, Brodrick, & Gray.*

(1) W. N. (1885), p. 46. (2) W. N. (1887), p. 88.

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[1891 F. 260.]

Charity—Endowed School—Dismissal of Schoolmaster—Injunction—Right to Sue—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17 [*Revised Ed. Statutes, vol. xi., p.* 986.]

The deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes, and power was given to the three vicars to remove the master for certain specified causes. The Plaintiff was appointed master of the school in April, 1890, and in December, 1890, two of the vicars served on him a notice of dismissal, signed by themselves, which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of the Plaintiff's dismissal, and he had not had any opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted. The Plaintiff commenced an action against the two vicars who had signed the notice, and moved for an interlocutory injunction to restrain them from removing, or purporting to remove, him from his office until after the holding of a meeting of the vicars, and until he should have had an opportunity of being heard at such a meeting in reply to any charges made against him :—

Held, that the Defendants could not remove the Plaintiff without first affording him an opportunity of being heard in his own defence at a properly constituted meeting of the vicars, and that he was entitled to the injunction:

Held, also, that for the purpose of obtaining this relief it was not necessary, under sect. 17 of the *Charitable Trusts Act*, 1853, to obtain the consent of the Charity Commissioners to the bringing of the action.

MOTION by the Plaintiff asking (in accordance with the claim indorsed on the writ) "that the Defendants, or either of them, may be restrained from removing, or purporting to remove, the Plaintiff from his office of master of the school at *Thorp Arch*, in the county of *York*, founded by the Lady *Elizabeth Hastings*, until after the holding of a meeting of the vicars of *Thorp Arch*, *Collingham*, and *Ledsham*, in the said county, in accordance with the terms of an indenture of bargain and sale, dated the 14th of December, 1738, in virtue of which the said school was established, and unless they shall have found that circumstances have occurred necessitating the removal of the Plaintiff, as provided by the said indenture, and until the Plaintiff shall have had an

opportunity of being heard at such meeting in reply to any charges made against him in respect of his conduct in his said office."

By the indenture of bargain and sale dated the 14th of December, 1738, land was conveyed by Lady *Elizabeth Hastings* to trustees, for the purpose of founding certain charity schools. The deed provided that the schools should be ordered and regulated, and the premises thereby bargained and sold should be managed, in such manner as in and by certain schedules annexed to the deed was appointed.

The schedules contained (*inter alia*) the following provisions: "The said *Elizabeth Hastings* directs and appoints *John Benson*, clerk, vicar of *Ledsham*, *Christopher Wetherhead*, clerk, vicar of *Thorp Arch*, and *Robert Potter*, clerk, vicar of *Collingham*, and the succeeding vicars for the time being of the said three vicarages for ever, to be managers of the said perpetual charities, and appoints the following rules, and desires the same may be observed. . . . Also that the said vicars shall from time to time nominate and appoint some person who shall give bond with sufficient sureties for his good behaviour and faithful performance as bailiff. That for all meetings of the vicars, other than the yearly ones before appointed, the bailiff shall give the vicars ten days' notice before such meeting is necessary, and that no act in the execution of the trust by a less number than two so meeting and agreeing shall be valid, except in the management of the charity schools for girls in *Ledsham*, for the management of which particular directions are given.

"Also that the masters of the schools of *Ledsham*, *Thorp Arch*, *Collingham*, and *Wyke*, be appointed by the vicars of *Ledsham*, *Thorp Arch*, and *Collingham*, or the greater number of them, provided the vicar's vote where the vacancy is be one of them.

"And the said vicars shall visit the schools under their care once at least in every month, and the vicars of *Thorp Arch* and *Collingham* shall visit the schools in each other's parish, and the vicars of *Collingham* and *Thorp Arch* shall visit *Wyke* school, and they, with the vicar of *Ledsham*, shall visit the boys' school at *Ledsham* once every year in order to make a judgment of the master's diligence and the scholars' improvement in each school,

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and, if they shall find that the children of each school under their respective care do not make such improvements as might reasonably be expected, and that any of the masters of the said schools do not give a good example to the children, and are deficient in either reading, writing, or accounts, or in grounding the children under their care in the principles of the Christian religion, then that the said vicars shall remove such master. . . . And the said vicars shall take bonds from every schoolmaster or mistress whom they shall choose to resign and quit the school upon the request of the said three vicars, or any two of them."

The Plaintiff, *William Fisher*, was appointed master of the boys' school at *Thorp Arch* in April, 1890. The Defendants were the Rev. *W. H. Jackson*, vicar of *Thorp Arch*, and the Rev. *G. L. Beckwith*, vicar of *Collingham*. On the occasion of the Plaintiff's appointment he entered into a bond with the Defendants in the penal sum of £100, the condition of the bond being, "that if the above bounden *William Fisher*, from time to time and at all times hereafter during his continuance in the said place or office of schoolmaster, do and shall observe, perform, fulfil, obey, and keep all the rules and orders mentioned and set forth in the said indenture and schedule thereto annexed, so far as the same relate to and concern the school and schoolmaster at *Thorp Arch* aforesaid; and also do and shall faithfully, diligently, and carefully execute, perform, and discharge his duty in the said place or office of schoolmaster of the said school in all things and respects whatever for the benefit and credit of the said school, according to the trusts in him reposed by the said *W. H. Jackson* and *G. L. Beckwith*, and, if at any time hereafter the said *W. H. Jackson* and *G. L. Beckwith*, or any the person who may at any time hereafter be appointed vicar of either of the said parishes of *Thorp Arch* and *Collingham*, and any the person who may be at any time hereafter appointed vicar of the parish of *Ledsham*, in the said county of *York*, or any two of such persons, being convinced to their satisfaction that the above bounden *William Fisher* is apparently negligent of the said duty and trust in him reposed, to the detriment and injury of the said school and scholars, and shall thereupon see good and sufficient cause and reason to remove and displace the above bounden *William Fisher*

from the said place or office of master of the said school, and do and shall elect and choose some other person to succeed him therein, if the above bounden *William Fisher* do and shall, within three months after the date of a notice in writing to be delivered to or left for him at the said school under the hands of the said *W. H. Jackson* and *G. L. Beckwith*, and the person to be appointed vicar of *Ledsham*, or any two of them, or any two of the persons who may at any time hereafter be appointed vicars of the said respective parishes of *Thorp Arch*, *Collingham*, and *Ledsham*, peaceably and quietly leave, surrender, and resign his said place or office of schoolmaster," the bond should be void; otherwise it was to remain in full force and virtue.

On the 1st of December, 1890, the following notice, dated the 28th of November, 1890, and signed by the two Defendants, was served on the Plaintiff:—

"We, the undersigned, being two of the managers of the *Lady Elizabeth Hastings School*, at *Thorp Arch*, aforesaid, having inquired into your conduct and management of the said school, and having satisfied ourselves that the said school has not been managed and conducted by you for the benefit or advantage of the said school and its scholars, and that you have been negligent of the duties and trusts in you reposed as such master, and seeing good and sufficient cause and reason for removing and displacing you from the said place or office of master, do hereby give you notice that we dismiss you from the said office of schoolmaster at the expiration of three calendar months next after the service hereof, and do hereby require you peaceably and quietly to leave, surrender, and resign the said office of schoolmaster of the said school, and to give up the possession of the school and schoolhouse, with their appurtenances, to us, or to such person as we shall appoint to succeed you in the said office."

The notice was accompanied by the following letter, written by the Defendant *Jackson*, and dated the 1st of December, 1890:—

"Your extraordinary conduct in ignoring my relation to you, and setting me at defiance by not replying to my letters, has left me no alternative but to take the step I am now taking. I

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have laid the matter before the trust lawyers, and by their advice herewith serve you with accompanying formal notice to leave. This conduct of yours alone would fully justify me in taking this step. But I am taking it in the interests of the school, of the children, whom you have ill-treated and mismanaged, and of the parents, whose confidence and respect you have hopelessly forfeited. Other facts have come to my knowledge, since our interview on the 4th of November, which convince me how impossible it would be for me to retain you in your present position.

"Only to-day, a parent has with difficulty been prevented from sending his children to *Boston*, because of your recklessly turning the children out of the school after they had had their dinner during the severe weather of last week, in consequence of which they got bad colds.

"I herewith give express directions that during the remainder of your stay the children who remain for their dinner shall have the option of staying in the school if the weather is cold."

On the 7th of January, 1891, the Plaintiff wrote to the Defendant *Jackson*, as follows:—

"I am advised that the notice of dismissal served on me on or about the 1st of December, 1890, is invalid, and I am not prepared to act upon it."

This action was commenced on the 16th of February, 1891.

The Plaintiff, in his affidavit in support of his motion, said, he was informed and believed that no meeting as required by the deed was held to consider the notice of dismissal, and he said that, prior to the delivery of the notice, no charge or allegation of misconduct was communicated to him by the Defendants, and he had never had an opportunity of investigating, meeting, or refuting any such charges or allegations, if any had been made.

In reply to this, the Defendant *Jackson* deposed, that in September, 1890, complaints were made to him by the parents of a great many of the pupils attending the school of the conduct of the Plaintiff, both towards the pupils and towards the parents themselves, and the Defendant said he found, that in conse-

quence of such conduct five of the pupils had been removed, and a very bitter hostility against the Plaintiff had grown up among the parents of the children. He went on to specify the nature of the conduct complained of, and said that such complaints continued to be made by the parents down to the 4th of November, 1890, and he ascertained that up to that time five children had been removed from the school in consequence of the alleged misconduct of the Plaintiff.

The affidavit continued: "On the 4th of November, 1890, having ascertained that several more of the children were about to be removed in consequence of the Plaintiff's alleged conduct, I sent for the Plaintiff, and told him that the parents were so hopelessly estranged from him that five children had already left the school, and that more were leaving, and that he had better seek another sphere of work. I further told him, that through his want of tact and consideration the parents were all prejudiced against him, and that he could never recover his position, and urged him to resign; and I impressed upon him, that, if he did not give me notice, I should be compelled to give him notice. He asked for time to think it over, and agreed to let me know his decision on the 8th of November. Not hearing from the Plaintiff on the 8th of November, I wrote to him on the 11th of November, and again on the 17th of November, for his decision, but he did not reply verbally, or otherwise, to either of my letters.

"Finding, that the Plaintiff would not move in the matter, I communicated with the Defendant *G. L. Beckwith*, and he and I signed and sent to the Plaintiff the notice referred to in his affidavit.

"Prior to our sending the notice, I had come to the conclusion, and honestly believe, that the Plaintiff had not managed or conducted the school for the benefit or advantage of it, or of its pupils, and that he had been negligent of his duties, and that his continuance in the office of master would be detrimental to the interests of the school and to the proper education of the children, and would lead to the withdrawal from the school of most, if not all, of the children by their parents.

"The notice was served on the Plaintiff on the 1st of December,

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1890; but the Plaintiff, prior to the 7th of January, 1891, did not raise any objection or question in respect of the validity of the notice, but, on the contrary, a few days after his receipt of the notice, he offered himself as a candidate for the mastership of *Rudstone School.*

"Hearing of such candidature, I sent for the Plaintiff, and told him, that though he did not deserve it, I would do my best for him in the matter; but the Plaintiff, though he had the opportunity, did not then raise any question as to the said notice.

"Since the 1st of December, 1890, further complaints have been made to me by parents of some of the pupils in respect of the Plaintiff's mismanagement. I believe, that in consequence of the alleged conduct of the Plaintiff, nine children in all, out of an attendance of forty, have left the school, and that several more are only permitted to remain on as pupils at my request, in the expectation of a change in the mastership.

"On several occasions, prior to the 1st of December, 1890, I communicated to the Plaintiff and discussed with him the charges of misconduct and complaints which had been made against him by the parents of the pupils, and prior to the delivery of the notice the Plaintiff was in possession of the particulars of all the said charges and complaints."

The Defendant *Beckwith* made an affidavit in which he said:—

"When I signed the notice of dismissal I was convinced to my satisfaction that the Plaintiff was apparently negligent of his duties as master of the school, and of the trust in him reposed, to the detriment and injury of the school, and I was convinced and believed that the Plaintiff had not managed or conducted, and was not then managing or conducting, the school for the benefit of it or its scholars, and that the continuance of the Plaintiff in his office would be detrimental to the interests of the school."

The Plaintiff, in his affidavit in reply, denied the allegations made against him in the Defendant *Jackson's* affidavit.

No meeting of the three vicars was, in fact, ever held to con-

sider the charges against the Plaintiff, and no opportunity was afforded him of being heard at such a meeting in his defence. There was no evidence that the vicar of *Ledsham* had been consulted about the matter. He had been only recently appointed vicar.

E. Cutler, Q.C., and *H. Lynn*, for the Plaintiff:—

There has been no such delay as can preclude the Plaintiff from obtaining an interlocutory injunction. The delay has in no way injured the Defendants, and the removal of the Plaintiff from his office would be an irreparable injury to him. The general rule of law is, that, when a judicial authority is exercised against any person, he is entitled to be heard in his defence before a decision is come to. The power of removing the Plaintiff from his office of schoolmaster can only be exercised in accordance with the provisions of the deed of trust which created the power: *Rendall* v. *Blair* (1). The power can be exercised only by all the three vicars at a meeting. The bond given by the Plaintiff does not affect the question, and in fact the bond does not really go beyond the provisions of the original deed of trust which regulates the mode of removing the master and the reasons for his dismissal. The cause alleged for the dismissal of the Plaintiff is not within the provisions of the trust deed.

The action is not one for which the consent of the Charity Commissioners is required under sect. 17 of the *Charitable Trusts Act*, 1853: *Rendall* v. *Blair*.

[NORTH, J., referred to *Cooper* v. *Wandsworth Board of Works* (2).]

Cozens-Hardy, Q.C., and *J. F. Popham*, for the Defendants:—

The Plaintiff is not entitled to sue without having first obtained the consent of the Charity Commissioners, for the action relates to the administration of the trust: *Rendall* v. *Blair*.

[NORTH, J.:—Would it not be sufficient for the Plaintiff's purpose if an injunction were granted to restrain the Defendants

(1) 45 Ch. D. 139. (2) 14 C. B. (N.S.) 180.

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from removing him from his office until after the holding of a meeting of the three vicars, and until after he has had an opportunity of being heard at the meeting in his own defence?]

[*E. Cutler*, Q.C., for the Plaintiff, assented to this.]

In *Rendall* v. *Blair* (1), the plaintiff, on the hearing of the appeal, abandoned his claim to question the propriety of his dismissal, and the case was limited to the question, whether the defendants were the persons who were entitled to give him notice of dismissal—whether they had been duly appointed managers of the school. The Court of Appeal held that, under sect. 17 of the *Charitable Trusts Act*, 1853, the obtaining the leave of the Charity Commissioners was not a condition precedent to the right to sue, but was only a condition precedent to the obtaining of relief, and that it was not required at all for the obtaining of the particular relief which was then sought. The question there was, whether the defendants were mere strangers. In the present case the question is one which affects the administration of the charity, and therefore the leave of the Commissioners is required. The Plaintiff's case is, that he is a beneficiary under the trust deed, and he says that the Defendants have been guilty of a breach of trust.

[NORTH, J.:—My difficulty is that I cannot see that the Plaintiff has ever had an opportunity of being heard.]

The notice of dismissal was served on the Plaintiff on the 1st of December. He made no complaint of it to the trustees until his letter of the 7th of January, and the writ was not issued until the 16th of February. He had an interview with the Defendant *Jackson*, in November, and he applied for another situation.

On the true construction of the deed of trust, two of the three vicars have power to dismiss the schoolmaster. Moreover, the contract between the Plaintiff and the Defendants is contained in the bond, and that is a bargain entirely outside the trust deed.

In *Cooper* v. *Wandsworth Board of Works* (2) the mischief had been already done, and the plaintiff's property had been destroyed. In the present case the Plaintiff had ample notice of

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the Defendants' intention to dismiss him, and he did not ask to be heard in his defence.

NORTH, J.:—

I think the Plaintiff is entitled to an injunction, limited in the way which I have already mentioned. [His Lordship, after stating the facts, and observing that Mr. *Jackson* had no right to act alone in the matter, and to say that if the Plaintiff did not explain matters to him he would give him notice to quit, continued:—]

The action was not commenced until the 16th of February, and notice of the present motion was given on the 27th of February. That was, no doubt, waiting a long time before taking any step to restrain the Defendants from going on with the school business; but, in my opinion, the delay is not sufficient to prevent the Plaintiff from obtaining relief if he is otherwise entitled to it.

The first objection raised on behalf of the Defendants is, that the Plaintiff has not obtained the leave of the Charity Commissioners to sue, and that the case comes within sect. 17 of the *Charitable Trusts Act* of 1853. In my opinion, that leave is not required for the present application. The Plaintiff seeks to remain in the position of schoolmaster, to which he was validly appointed, and which he still holds, unless that position has been effectually determined by what has taken place.

I decline to go into the question whether his merits or demerits have been such as to justify the Defendants in giving him a notice to quit. I will assume for the present purpose that, if they had taken proper proceedings for the purpose, they would have had a right to give him notice to determine his office. But the difficulty in the Defendants' way is this, that they have given him this notice without affording him any opportunity of being heard in his own defence before it is acted upon. In the first place, I think that a meeting of the three vicars should have been called; but my decision does not turn upon that point. I am willing to assume for the present purpose that, if two of the three vicars had met together, and had told the Plaintiff what

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the complaints made of him were, and had asked him to give them an explanation of his conduct, that might have been sufficient. I am inclined to think that it would not, because I think the Plaintiff is entitled to be heard before the three vicars, so as to have the benefit, not only of one of them finding in his favour, but also of the influence which that one might bring to bear upon the minds of the other two. But, as I have already said, I do not base my decision on that point; I assume for the present purpose that, if Mr. *Jackson* and Mr. *Beckwith*, the Defendants who signed the notice to quit, had met together and had given the Plaintiff the opportunity of being heard before them, they would have done all that was necessary. But I do not find that that course was pursued. I find that Mr. *Jackson* took upon himself to threaten to dismiss the Plaintiff, unless he would resign, and that afterwards the notice which was given was signed by Mr. *Jackson* and Mr. *Beckwith* only, and there is nothing to shew that any notice was given to the Plaintiff that he was to be dismissed without the tribunal which could decide upon his conduct being summoned, and without his having an opportunity of appearing before it. That being so, it appears to me that an elementary principle of justice has been neglected; the person accused has not been told what the charges against him are, and has not had an opportunity of answering them. It is true that complaint was made by Mr. *Jackson* to the Plaintiff with regard to some of the points which are said to be material; but that was not, in my opinion, such a statement to him of the charges against him by the tribunal which was going to decide upon them as was necessary. The case seems to me to come exactly within *Rendall* v. *Blair* (1). In that case the Court of Appeal imposed on the plaintiff the condition of not going into the merits, and confined him to the point, whether the persons who had given him notice of dismissal had been regularly appointed to their office. In the present case I decline to go into the merits, and for the present purpose I assume that, if the due formalities had been observed, the merits might have justified the dismissal of the Plaintiff. I have not had an opportuity of forming an opinion upon this point; but I assume it for the

(1) 45 Ch. D. 139.

present purposes in favour of the Defendants. But the Plaintiff says: "I hold this office, and, although you might turn me out, if you did so justly and fairly, you cannot do so now." That, as it seems to me, is an exactly parallel case to that which was before the Court of Appeal in *Rendall* v. *Blair* (1). The point raised by the plaintiff there was this: "The defendants were not duly and regularly appointed, and therefore they cannot turn me out of my office, and no leave from the Charity Commissioners to sue is necessary." The objection in the present case is this, that the Defendants, who might have been able to act legally and equitably, if they had followed the proper course for that purpose, have taken upon themselves to act in an unfair way towards the Plaintiff, and are, therefore, just as incapacitated from dismissing him as if there had been a defect in their appointment as vicars, or anything else depriving them of the power of exercising judicial authority over him. The observations of Lord Justice *Bowen* (2) seem to me to apply exactly here, because the Plaintiff's right is really a common law one depending on a contract, viz., the right to keep the place to which he has been validly appointed, until he is turned out of it by persons who have observed the necessary formalities for that purpose.

There are many authorities in the books bearing upon questions of this kind; but I will refer to one only, the decision of the Court of Exchequer in *Capel* v. *Child* (3), which seems to me very important, both for the principle which it lays down, and also because it answers the suggestion that the present Plaintiff is precluded from setting up any answer which he might have had to the claim of the Defendants to turn him out of his office by reason of the lapse of time and the proceedings which he has allowed his opponents to take without interference or objection on his part. The facts in *Capel* v. *Child* were these. By sect. 50 of the Act of 57 Geo. 3, c. 99, it was provided that, "Whenever it shall appear to the satisfaction of any bishop, either of his own knowledge, or upon proof by affidavit laid before him, that by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or

(1) 45 Ch. D. 139. (2) 45 Ch. D. 156.
(3) 2 C. & J. 558.

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the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, or the negligence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed," then, to put it shortly, the bishop may appoint a curate "to perform or assist in performing the duties," and may throw the burden of the stipend of that curate upon the person the insufficiency of whose performance of the duties has led to the necessity of the appointment. The Bishop of *London* on the 18th of January, 1830, served a requisition upon the Plaintiff as follows: "Whereas, it appears to us of our own knowledge, that the ecclesiastical duties of the vicarage and parish church of *Watford* are inadequately performed by reason of your negligence; we do therefore, under and by virtue of an Act of Parliament, made and passed in the 57th year of the reign of His late Majesty King *George* III. intitled 'An Act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in *England*, monish and require you to nominate to us a fit person, with a stipend of not less than £75 per annum, to be licensed by us to assist in performing the ecclesiastical duties of the said vicarage and parish church of *Watford*; further monishing you, that, if you shall neglect or omit to make such nomination for the space of three months after this requisition, we shall proceed to appoint a curate according to the tenor of the said Act."

The plaintiff did not appeal from the order, as he might have done to the archbishop of the province, nor did he appoint a curate, and on the 2nd of July the bishop licensed a stipendiary curate to perform the duties, and assigned to him a yearly stipend of £75 for that purpose. The plaintiff refused to permit this curate to act, although he tendered himself for the purpose. On the 22nd of February, 1831, the bishop issued a mandate or summons to the plaintiff stating that it had been represented to him that on the 2nd of January £37 10*s*., half a year's stipend, was due to the curate; that a demand for payment had been made; that the stipend remained unpaid; and the summons

required the plaintiff to appear before the bishop and shew cause "why the stipend so in arrear as aforesaid should not be paid and satisfied, and to hear and receive our determination in the premises." The summons also intimated, that, if the plaintiff did not appear, or, appearing, did not shew good cause, the bishop would proceed as by the Act he was empowered. The summons was served upon the plaintiff, and he did not attend the bishop as required, and the bishop thereupon proceeded to issue a monition to the plaintiff reciting what had taken place, and monishing the plaintiff to pay the stipend. That monition was served upon the plaintiff, and then, for the first time, he appeared, and alleged that he had not had a proper opportunity of being heard upon the original application. Lord *Lyndhurst*, C.B., after reading sect. 50 of the Act, said (1): "Does not this import inquiry, and a judgment as the result of that inquiry? He is to form his judgment; it is to appear to him from affidavits laid before him: but, is it possible to be said that it is to appear to him, and that he is to form his judgment from affidavits laid before him on the one side, without hearing the other party against whom the charge of negligence is preferred, which is to affect him in his character and in his property? That he is to come to that conclusion, without giving the other party an opportunity of meeting the affidavits by contrary affidavits, and without being heard in his own defence—without having an opportunity even of being summoned for that purpose? as in the present instance; there being no summons, for the monition was proceeded on immediately, without any intimation whatever from the bishop of his intention to proceed, to the party against whom that requisition proceeds. Now, if this be the case, with respect to that part of the Act of Parliament where the proceeding is on affidavit, it appears to me as a necessary consequence, that, where the bishop proceeds, not on affidavit, but on his own knowledge, the same course of proceeding is necessary; because, a party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses, for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defence. On consideration,

(1) 2 C. & J. 573.

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then, it appears to me, that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the Judge to proceed to pronounce the judgment." Then, referring to the requisition, Lord *Lyndhurst* said (1): "It is in form a judgment; it is in effect and consequence a judgment. It appears to me, therefore, considering the principles of justice, that this construction of the Act could hardly be more necessary, if it had been absolutely required by the language of the Act that a previous summons should be issued." Then he says (2): "Where there is an authority to pronounce a judgment, and an appeal is given from that judgment when it is pronounced, the party against whom the judgment is pronounced has a right to be heard on the original judgment: he has a right to be heard before the original judgment is pronounced, for the purpose of preventing that judgment from being pronounced; and the circumstance of its having been given makes in that respect, as I apprehend, no difference whatever." Then he says (3): "Here is a new jurisdiction given—a new authority given: a power is given to the bishop to pronounce a judgment; and, according to every principle of law and equity, such judgment could not be pronounced, or, if pronounced, could not for a moment be sustained, unless the party in the first instance had the opportunity of being heard in his defence, which in this case he had not; and not only no charge is made against him which he had an opportunity of meeting, but he has not been summoned that he might meet any charge."

Then Baron *Bayley* went very fully into the case. He said (4): "Upon the general principles of law, it would have been essential, if the bishop had proceeded by way of affidavit, to have given the opposite party an opportunity of being heard. When the bishop proceeds on his own knowledge, I am of opinion also that it cannot possibly, and within the meaning of this Act, appear to the satisfaction of the bishop, and of his own

(1) 2 C. & J. 574.
(2) Ibid. 576.
(3) 2 C. & J. 577.
(4) Ibid. 578.

knowledge, unless he gives the party an opportunity of being heard, in answer to that which the bishop states on his own knowledge to be the foundation on which he proceeds. It is not at all essential, in order to give effect to such proceedings, that there should be that delay which a suit in the Ecclesiastical Court would naturally produce. It would be quite sufficient if the bishop were to call the party before him, and to state to him the grounds on which he thought the duties were inadequately performed, by reason of his negligence; and he should have asked whether he had or had not any grounds on which he could answer that charge; but, is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard? In our Courts of law, you cannot obtain a judgment against a party, without entering an appearance for him, so that it shall seem as if he had appeared. He either does actually appear, or else you enter an appearance for him, according to the Act of Parliament expressly made for that purpose; and made because it is considered an invariable maxim of law, that you cannot proceed against a party without his having the opportunity of being heard, and without his appearing in Court, before a judgment shall be pronounced against him. In the case of proceedings before magistrates on summary conviction, if the conviction does not state either that the party was summoned, or that he appeared, the conviction is bad. If you remove a corporator, and it turns out that he was not summoned, however gross and flagrant his misconduct may have been, he is entitled to be restored; and I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard." Baron *Vaughan* and Baron *Bolland* also came to the same conclusion. That case has been repeatedly recognised and acted upon since, and it renders it impossible for me to say that in the present case the Defendants have done justice to the Plaintiff. If they had told him that the three vicars, or, I will assume, two of them, were going to meet on a certain day to consider certain specified charges against him, and he had

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been asked to attend and shew cause why they should not dismiss him from his office, that would have given him the opportunity of attending; and, if he had chosen not to do so, it could not then have been said that he had not been summoned, or that he had not had the opportunity of being heard. Not only, however, was he never summoned to appear before the two persons who in fact pronounced judgment against him, but I cannot even find from the evidence that those two persons themselves ever considered the matter. All that I know is, that the interview which did take place was between Mr. *Jackson* and the Plaintiff only. The Plaintiff never met Mr. *Beckwith* with regard to any of these matters, and all I know about Mr. *Beckwith* is, that he says in his affidavit that, when he signed the notice of dismissal, he was "convinced that the continuance of the Plaintiff in his office would be detrimental to the interests of the school." His being convinced is not enough; it may be he was convinced because he relied on Mr. *Jackson*, and thought that what Mr. *Jackson* believed to be right must be right in itself.

Under these circumstances, I come to the conclusion that, however right the Defendants might have been in dismissing the Plaintiff, if he had had proper notice, they were wrong in proceeding against him without such notice. It is said that he never asked for an opportunity of being heard. But he was never told that the persons who alone had power to dismiss him were about to meet to consider his case. Under the circumstances, I cannot say that the Defendants are entitled to treat this as a valid notice of dismissal, the charges against the Plaintiff having never been stated to him or considered in his presence, and the Defendants, if they ever did arrive at a joint conclusion upon the charges, having done so behind the Plaintiff's back.

In my opinion the Plaintiff is entitled to an injunction restraining the Defendants, until the trial of the action or further order, from removing him from his office until after the holding of a meeting of the vicars, in accordance with the terms of the deed of trust, and until the Plaintiff shall have had an opportunity of being heard at such meeting—following the

words of the notice of motion with the omission I have already mentioned.

Something was said about the terms of the bond which the Plaintiff executed. I do not think it necessary to consider that. There would be a difficulty in saying that, however liable the Plaintiff might be as regards the penalty of the bond, he could be turned out of his office upon any grounds not coming within the powers given to the vicars by the deed of trust. But I abstain from expressing any conclusion on that part of the case. Assuming the bond to be perfectly legal and binding upon the Plaintiff, still I think the Defendants are not entitled to say on this notice that his office has been validly determined. I have not formally decided the point whether there must be a meeting of all the three vicars, and I do not wish to go beyond the notice of motion. But, for the guidance of the parties, I may say, that I do not think the Defendants have a right to act without giving notice to the third vicar, so that he might have an opportunity of being present. He might not choose to come, and I do not intend to decide that in that case the two might not act in the absence of the third.

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Solicitors: *Baker & Nairne; Wilkinson & Son,* agents for *Perkins & Perkins, York.*

W. L. C.

NORTH, J.

1891
March 10.

In re WEBSTER.

Solicitor and Client—Costs—Taxation—Common Order—Order obtained by Suppression of material Facts—Order become inoperative by Effluxion of Time—Right to obtain Second Order of Course—6 & 7 Vict. c. 73, s. 37 [Revised Ed. Statutes, vol. ix., p. 128].

When a client has obtained the common order to tax his solicitor's bill, if he allows the time thereby limited for the making of the certificate to elapse without taking any proceedings under the order, he is not entitled to obtain a second order of course, suppressing the fact that he has obtained the first order.

On the 27th of June a client commenced an action in the Queen's Bench Division against his solicitor, claiming £75 as money received by the solicitor for his use. On the 1st of July the solicitor delivered his bill of costs to the client. On the 17th of July the solicitor delivered his defence in the action, claiming to set off against the client's demand professional charges to the amount of £90, and some other items amounting to £31, in respect of which he claimed indemnity from the client. On the 30th of July issue was joined in the action. On the 1st of October the client (suppressing the existence of the action) obtained *ex parte* in the Chancery Division the common order to tax the solicitor's bill. The order was not served on the solicitor till the 29th of October, and no proceedings were taken under it before it became inoperative by reason of the expiration of the month thereby limited for the making of the Taxing Master's certificate. On the 11th of February (the action not having been yet tried), the client (suppressing the existence of the action and the making of the former order to tax) obtained *ex parte* in the Chancery Division a second common order to tax the solicitor's bill. Upon a motion by the solicitor to discharge this order for irregularity:—

Held, that the second order had been obtained irregularly, and by means of a suppression of material facts, and that the client must pay the costs of the motion to discharge it:

Held, however, that the order should not be discharged entirely; but that it should be left standing with the omission of the latter part, which directed the payment of what should be found due on the taxation; and that the payment of this sum, as well as of the solicitor's costs of the motion, should be left to be dealt with by the Judge in the action.

MOTION by a solicitor to discharge a common order to tax his bill of costs.

On the 27th of June, 1890, *Mark Peat*, the client, commenced an action in the Queen's Bench Division against *W. S. Webster*, the solicitor, claiming the sum of £74 18*s.* 8*d.*, as being

money received by the Defendant for the use of the Plaintiff, and interest thereon. On the 1st of July, 1890, the Defendant delivered his bill of costs to the Plaintiff. On the 17th of July, 1890, the Defendant delivered a statement of defence, by which he claimed (*inter alia*) to be entitled to set-off, to an amount equal to the Plaintiff's claim in the action, professional charges for work done as a solicitor, and some other items, amounting to £31, in respect of which he said that he had incurred liability for the Plaintiff against which the Plaintiff ought to indemnify him. The Defendant said that the total amount of his professional charges was £90 4*s.* 4*d.*, but that he set off only so much as should be equal to the Plaintiff's claim, after giving credit for such amounts as should be allowed in respect of certain matters thereinbefore mentioned. On the 30th of July, 1890, the Plaintiff delivered his reply, by which he joined issue with the Defendant, and pleaded a settled account. On the 1st of October, 1890, the Plaintiff obtained *ex parte* in the Chancery Division the common order for the taxation of the Defendant's bill. This order contained at the end of it the following clause: "And it is ordered that no proceedings be commenced against the Petitioner in respect of the said bill pending this reference, but the said Master is to make his certificate in a month (unless the said Master shall extend the time to enable him to make his certificate), or this order is to be of no effect." On applying for this order, the Plaintiff did not state the existence of the action. The order was not served on the Defendant till the 29th of October, 1890. On the 3rd of December, 1890, the Plaintiff commenced a second action in the Queen's Bench Division against the Defendant, claiming a further sum of £37 7*s.* 1*d.*, in respect of money received by the Defendant for the use of the Plaintiff, and interest thereon. On the 3rd of February, 1891, an order was made consolidating the two actions. On the 5th of February the Defendant delivered a defence, by which he claimed to be entitled to the same set-off as in the first action. On the 9th of February the Plaintiff delivered a reply, by which he joined issue with the Defendant, and pleaded the same settled account as in the first action. On the same day notice of trial was given, and the actions were

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entered for trial. On the 11th of February the Plaintiff obtained *ex parte* a second common order for the taxation of the Defendant's bill of costs. On applying for this order the Plaintiff did not state either the making of the former order or the existence of the actions. The order was in the same form as the first order, and it was served on the Defendant on the 16th of February. On the 3rd of March the Defendant gave notice of motion, asking that the order of the 11th of February might be discharged for irregularity, upon the ground of the suppression by the Plaintiff of material facts necessary to have been stated in the petition upon which the order was granted—viz., that on the 1st of October an order had been made on the application of the Plaintiff for the same purpose, and that the two consolidated actions were pending in the Queen's Bench Division, in which the bill of costs was in question, and formed the subject-matter by way of set-off, counter-claim, or otherwise. And also upon the ground that the application for any such order ought to have been made to the Queen's Bench Division, and that the order did not contain any special directions applicable to the peculiar circumstances of the case.

Oswald, for the solicitor:—

The order of the 11th of February was irregularly obtained and ought to be discharged.

(1.) By obtaining the order of the 1st of October to tax the bill the client exhausted his remedy by order of course under sect. 37 of the *Solicitors Act* of 1843. When an order of course has been obtained, and it has been allowed to lapse by effluxion of time, the applicant is not entitled to obtain a second order of course, whatever may be his rights in regard to a special order. The effect of the order is to prevent the solicitor from commencing any proceedings in respect of his bill, pending the reference for taxation; and if, when an order of course has expired without any proceedings being taken under it, the client is entitled as a matter of course to obtain a second order, he might abandon an order simply because, *e.g.*, he did not like the Taxing Master to whom the reference was made, and he might go on during twelve months obtaining twelve succes-

sive orders of course, thus preventing the solicitor during the whole of that period from taking proceedings in respect of his bill, and this though the order itself expressly provides that it is to be of no effect if the master does not make his certificate in a month, unless he extends the time for so doing. The limitation of time contained in the order would thus be rendered nugatory.

(2.) The order of the 11th of February was obtained by a suppression of material facts. The former order and the existence of the actions ought to have been stated when the application was made, and indeed the existence of the first action should have been stated when the order of the 1st of October was obtained: *In re Thompson* (1). The form of order for the taxation of a solicitor's bill when the solicitor has already commenced an action on the bill differs from the form which is in use when he has not done so: *Seton* on Decrees (2); *Re Farington* (3). If an action has been commenced the rule of one-sixth does not govern the costs of the action; but the solicitor is entitled to those costs if he recovers anything upon the taxation, and the order so provides: *In re Barnard* (4).

[NORTH, J., referred to *Lumley* v. *Brooks* (5).]

Moreover, the order for taxation may affect the right of set-off which the solicitor has claimed in the action, and in this way an injustice may be done to him.

(3.) The application for taxation ought to have been made to the Queen's Bench Division in the action. No doubt, since the *Judicature Act* any Division of the High Court has jurisdiction: *In re Pollard* (6); but as a matter of convenience the application should have been made to the Queen's Bench Division.

Foa, for the client:—

There is nothing in the Act to shew that a second order of course cannot be obtained when the first has become ineffectual. The first order has never had any operation at all.

[NORTH, J.:—It has prevented the solicitor from suing during a month. That cannot be undone.]

(1) 30 Ch. D. 441, 451, 453.
(2) 4th Ed. pp. 604, 616.
(3) 33 Beav. 346.
(4) 2 D. M. & G. 359, 365.
(5) 41 Ch. D. 323.
(6) 20 Q. B. D. 656.

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The only thing which has been interfered with is the prosecution of the counter-claim. Sect. 37 is an enabling one for the client and a disabling one for the solicitor; the suggested construction would be a very harsh one to the client.

The form of an order to tax under the Act would be exactly the same in whichever Division it was made. In *Lumley* v. *Brooks* (1) the Court of Appeal did not in their order adopt what was said by Lord *Cranworth* in *In re Barnard* (2).

The solicitor will be in no way prejudiced by the omission to state the existence of the action. The client is willing to undertake not to receive payment of what may be found due to him on the taxation until after judgment is given in the action.

Oswald, in reply:—

[NORTH, J.:—Why should not the order be allowed to stand, omitting the directions for payment of what shall be found due, and leaving the question of payment to be dealt with on the trial of the action?]

The order was irregularly obtained, and the practice is to discharge an order which has been so obtained.

[NORTH, J.:—In *In re Thompson* (3) the Court of Appeal allowed an order which had been obtained irregularly to stand, but gave no costs of the proceedings to the clients who had obtained it.]

The irregularity in that case was of a very different kind from that which has been committed here. There the circumstances which were not stated would not, if they had been stated, have prevented the making of the order. No alteration was required in the order, and none was made. Here, if the facts had been stated, the order would not have been made at all. At any rate, all the costs should be paid by the client.

NORTH, J. (after stating the facts, continued):—

Though the order of the 1st of October was not served on the solicitor till the 29th of October, and on the next day became

(1) 41 Ch. D. 323. (2) 2 D. M. & G. 365.
(3) 30 Ch. D. 441.

ineffectual for the future by effluxion of time, yet it had produced an effect in the past, because it was always ready to be put in force against the solicitor, if he had taken any proceedings against the client to recover his costs. Nothing, however, was done under the order, and the time limited by it expired. The first point taken on behalf of the solicitor is, that the client, by obtaining the order of the 1st of October, exhausted his statutory remedy by order of course, and that he could not, after that order had become ineffectual, obtain a second order of course to tax the same bill. It is also said that there was a suppression of material facts when the second order was obtained. I think this argument is well founded. I think that, when a client has obtained the common order to tax his solicitor's bill—an order which prevents the solicitor from commencing proceedings against the client in respect of the bill pending the reference, and also provides that, unless the master makes his certificate within a month, the order is to be of no effect—the client ought not to apply for a second precisely similar order of course, suppressing the fact that he has obtained the first order, and that he has allowed it to become ineffectual. If he is entitled to do this, the result would be, that a client might in twelve successive months obtain twelve successive orders of course for the taxation of the same bill, and thus during the whole of that period prevent the solicitor from taking any proceedings for the recovery of his bill. I think this would give the client much more than the Act intended him to have. It is quite possible that he might be entitled to a second order upon making a special application on special grounds; but I think he is not entitled to obtain a second order of course, suppressing the fact that he has obtained the first.

Then the second fact suppressed was, the existence of the action which the client had commenced against the solicitor, and in which the solicitor had claimed to set off part of the amount of his bill of costs. This objection, in fact, applies to both the orders to tax. The pendency of an action by a solicitor against his client for the amount of a bill of costs does not prevent the client from obtaining the common order to tax the bill; but in such a case the order is in a different form from that which is

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adopted when no action has been brought. The two forms of order are given in *Seton* on Decrees (1). The form of an order for "taxation after action brought," provides for the stay of all further proceedings against the client in respect of the bill pending the reference, and it also provides that, "in case it shall appear that there is anything due to the solicitor, the Master do tax the solicitor his costs of the action, and that such costs be added to the amount which shall be so found due." That form seems to apply to a case in which the bill of costs is the only matter in dispute in the action. In the present, other matters are involved in the action. The action is brought for money alleged to have been received by the solicitor to the use of the client, and the solicitor's answer is, that the client has no right to recover anything, because he has a claim against him for a larger amount, which is made up in part of the bill of costs. The order which the client has obtained to tax the bill provides for the payment by the solicitor of what may be found due from him to the client, which is not consistent with a set-off; and when this order was obtained the proceedings in the action including the plea of set-off ought not to have been kept back from the Court. The order was obtained by a suppression of material facts. In *Re Farington* (2), a client had obtained the common order to tax his solicitor's bill, before he had been served with the writ in an action which a solicitor had already commenced against him for the amount of the bill; and Sir *J. Romilly*, M.R., said that, as the client knew nothing of the writ when he obtained the order, it was impossible to hold the proceeding to be irregular. But no one can read the judgment in that case without seeing that, if the writ had been served on the client before he obtained the order to tax, the Master of the Rolls would have held that the order had been improperly obtained.

Then the question arises, whether I shall discharge the order altogether as having been irregularly obtained, or whether I shall leave it standing so far as it directs the Master to tax the bill and to certify the amount due. As a general rule, no doubt, an order which has been irregularly obtained will be discharged

(1) 4th Ed. pp. 604, 616. (2) 33 Beav. 346.

altogether. But in *In re Thompson* (1), the Court of Appeal, though they held that under the circumstances of the case clients ought not to have obtained the common order to tax the bill of their solicitors, but ought to have obtained a special order upon a statement of the facts, yet the Court left the order standing allowing the clients no costs of the proceedings to obtain it. In the present case, it is in the interest of both parties that the costs should be taxed under the order which has been already obtained, and therefore, following the precedent of *In re Thompson*, I propose to leave standing that part of the order which directs the taxation of the costs, and to discharge only the latter part which directs payment of the amount found due. The solicitor's costs of this application will be taxed by the Master and certified separately. But I leave the question of the payment of that amount, and of the amount to be certified under the order for taxation, to be dealt with by the Judge at the trial of the action.

Solicitors: *W. S. Webster; H. K. Gow.*

W. L. C.

In re COX & NEVE'S CONTRACT.

NORTH, J.
1891
Feb. 28; *March* 12.

[1890 C. 2940.]

Vendor and Purchaser—Objections to Title—Condition limiting Title to less than Forty Years—Objection to Anterior Title discovered by Purchaser before Completion—Delay in giving Notice to Vendor.

Property was put up for sale by auction on the 11th of June, 1890. The particulars described the property as "freehold." The conditions of sale provided that the title should commence with a mortgage dated the 29th of July, 1852, and that the purchaser should within fourteen days after the delivery of the abstract, send to the vendor's solicitors all his objections and requisitions as to the title, and that subject thereto, the title should be deemed to be accepted.

An abstract of title, commencing with the mortgage of the 29th of July, 1852, was delivered to the purchaser on the 24th of June, 1890. On the 8th of July the purchaser sent various objections and requisitions to the vendor's solicitors. He was not satisfied with the vendor's replies, and on the 23rd of July he delivered further requisitions. On the 9th of August

(1) 30 Ch. D. 441.

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he issued a summons under the *Vendor and Purchaser Act*, asking for a declaration that his requisitions and objections had not been satisfactorily answered by the vendor, and that a good title had not been shewn in accordance with the particulars and conditions of sale. On the 16th of October the purchaser filed an affidavit in support of his summons, in which he raised as an objection to the title the existence in a deed of the 3rd of March, 1847, through which the title to part of the property was traced, of a covenant restricting the right of building on that part. The purchaser had discovered the contents of this deed by means of inquiries which he had made of a third party with reference to another matter; but the objection was not mentioned to the vendor until the affidavit of the 16th of October was filed. The Court was of opinion that the purchaser must be deemed to have acquired notice of the covenant shortly before the 23rd of July:—

Held, that the purchaser having acquired notice of the restrictive covenant, would be bound by it; that it formed a valid objection to the title; that he was not too late in raising the objection; and that he was entitled to be relieved from his contract.

Semble, that, as the purchaser had agreed to accept a title of less than forty years, he would, even if he had not discovered the covenant, have had constructive notice of it, since it would have been disclosed by the abstract, if a proper forty years' title had been shewn.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a purchaser of real estate, asking a declaration that his requisitions and objections in respect of the title to the hereditaments comprised in the contract of sale had not been sufficiently answered by the vendor, and that a good title to the hereditaments had not been shewn in accordance with the particulars and conditions of sale, and asking that the vendor might be ordered to return to the purchaser his deposit, with interest, and to pay his costs of investigating the title and the costs of the application.

The property, which was known as Nos. 74 and 75, *Great Queen Street, Lincoln's Inn Fields*, was put up for sale by auction, on the 11th of June, 1890, subject to certain conditions. It was described in the particulars of sale as of freehold tenure. The 4th condition provided that "The title shall commence with a mortgage deed dated the 29th of July, 1852." By the 5th condition, "the purchaser is within fourteen days after the delivery of his abstract to send" to the vendor's solicitors "a statement in writing of all his objections and requisitions as to the title, or evidence of title, or the abstract, and subject thereto the title is to be deemed accepted, and all objections and requisitions not

included in any statement sent within the time aforesaid are to be deemed waived, and an answer to any objection or requisition is to be replied to in writing within ten days after the delivery thereof, and if not so replied to is to be considered satisfactory, and time is to be deemed in all respects as of the essence of this condition. If the purchaser should take any objection or make any requisition which the vendor is unable or unwilling to remove or comply with, and should not withdraw the same after being required so to do, the vendor may, by notice in writing delivered to the purchaser or his solicitors, and notwithstanding any intermediate negotiation, rescind the contract for sale."

Condition 7: "The property is believed to be, and is to be taken as, correctly described, and any incorrect statement, error, or omission found in the particulars is not to annul the sale, or entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim or be allowed any compensation in respect thereof."

At the sale, *W. F. Neve*, was declared the purchaser of the property at the price of £12,300, and he paid a deposit of £1230.

An abstract of title to the property was delivered by the vendor on the 24th of June. The title thus shewn commenced with a deed of mortgage of the property, dated the 29th of July, 1852, by *John Lewis Cox* to *D. S. Bockett*. The present vendor, Miss *L. E. Cox*, derived title through *John Lewis Cox*. This mortgage deed contained (*inter alia*) a recital that by a deed, dated the 3rd of March, 1847, and made between *W. L. Farrer* of the one part, and the said *J. L. Cox* of the other part, a portion of the property situate at the rear was conveyed to the use of *J. L. Cox* in fee. On the 8th of July the purchaser sent to the vendor's solicitors various objections to and requisitions upon the title, among which was the following question: "Is the vendor, or are her solicitors, aware of any document or thing affecting the title or the property, which is not noticed in the abstract, and which, if remaining undisclosed, may prejudicially affect the purchaser?" On the 12th of July the vendor's solicitors replied to the purchaser's objections and requisitions, and they answered the above question thus: "We are not bound to answer this requisition." Some of the purchaser's requisitions

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referred to a right of way mentioned in the particulars. The purchaser was not satisfied with the vendor's replies to those requisitions, and he made inquiries of Messrs. *Farrer & Co.*, the solicitors of Sir *W. L. Farrer*, who was the owner of some adjoining property, and they produced to the purchaser the deed of the 3rd of March, 1847. On the 23rd of July the purchaser delivered further requisitions upon the title, in one of which he said: "Messrs. *Farrer & Co.* have shewn to the purchaser a deed of exchange dated the 3rd of March, 1847, which appears to shew that *J. L. Cox* was not then entitled to any right of way." On the 28th of July the vendor's solicitors replied to the further requisitions. Some correspondence ensued, and on the 9th of August the summons was issued.

On the 13th of August the purchaser's solicitors wrote to the vendor's solicitors a letter, in which they said: "We shall not file the evidence until towards the end of the vacation, but we have obtained copies from Messrs. *Farrer* of the deed of exchange of the 3rd of March, 1847" (and of two other deeds), "all of which, we contend, ought to form part of your abstract. We shall be happy to produce these copies to you."

Nothing more was said by the purchaser or his solicitors up to this time as to the contents of the deed of the 3rd of March, 1847.

On the 16th of October an affidavit made by the purchaser in support of his summons, was filed. In this affidavit the purchaser said that he had obtained from Messrs. *Farrer & Co.* a copy of the deed of the 3rd of March, 1847, and in par. 23 he said: "From the copy so obtained it appears that the said *J. L. Cox* thereby entered into a restrictive covenant with respect to the buildings that might be erected on the site of the said boiler-room and warehouse" [*i.e.*, the rear portion of the property sold.] "If I had known of the existence of such covenant at the time of sending my requisitions on the title, I should have required the vendor to procure the release thereof."

This affidavit was the first intimation which the vendor's solicitors had of the purchaser's objection to the restrictive covenant.

The purchaser was not cross-examined on his affidavit, and the vendor did not file any evidence in answer to par. 23.

The deed of the 3rd of March, 1847, was a deed of exchange by which *W. L. Farrer* (afterwards Sir *W. L. Farrer*) conveyed to *J. L. Cox* in fee (in exchange for other property which *J. L. Cox* thereby conveyed to him), the rear part of the property sold by Miss *Cox* to *Neve*. In this deed there was a covenant by *J. L. Cox*, for himself, his heirs, executors, administrators, and assigns, with *W. L. Farrer*, his heirs and assigns, that "*J. L. Cox*, his heirs or assigns, or any of them, or any person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for him, them, or any of them, will not nor shall, at any time or times hereafter, build or erect, or permit or suffer to be built or erected or remain or be, upon the said property hereinbefore conveyed, or any part or parts thereof, any building or erection whatsoever, other than and except the present buildings and erections, or other erections or buildings, of the same size height and dimensions, which may be hereafter erected or built in lieu or in place of the present buildings and erections."

Everitt, Q.C., and *Gaselee*, for the Purchaser:—

The 7th condition of sale does not prevent the purchaser from taking the objection to the restrictive covenant. That condition applies only to the physical state of the property. The existence of the covenant is a material objection to the title; it affects a substantial part of the property, and it will prevent the purchaser from having the full enjoyment of that which the vendor has contracted to sell to him, viz., the property described in the particulars, free from any incumbrances or restrictions other than those which were disclosed by the particulars and conditions. This objection was not discovered, at any rate till very shortly before the summons was issued. The deed of the 3rd of March, 1847, is the foundation of the vendor's title to the back part of the premises, and it ought to have been disclosed. If a forty years' title had been shewn that deed would have been abstracted. The vendor declined to answer the purchaser's general inquiry as to incumbrances. The vendor's advisers must have known of the covenant, if she did not know of it herself. When a purchaser discovers *aliunde* an objection going to the root of the

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title, he has a right to raise it: *Jones* v. *Watts* (1); *Nottingham Patent Brick and Tile Company* v. *Butler* (2). Such a covenant as this constitutes a fatal objection to the title: *In re Higgins & Hitchman's Contract* (3); *In re Ebsworth & Tidy's Contract* (4). The objection was not taken too late. The purchaser might have issued a fresh summons at any time before the completion of the contract, if he had discovered a fresh objection: *Phillipson* v. *Gibbon* (5).

Hadley (*Cozens-Hardy*, Q.C., with him), for the Vendor:—

The objection was taken too late. The very first suggestion of it was in the affidavit filed on the 16th of October, and even then the objection was taken very vaguely. Such an objection ought to have been taken at the earliest possible opportunity. The purchaser's advisers had the means of discovering it before the 23rd of July, for it is clear that they had before that day seen the deed of exchange, and the objection ought to have been taken then at the latest.

[NORTH, J.:—The covenant ought to have been disclosed in the abstract of title; if it had been, the purchaser would have had fourteen days within which to make the objection; why should he have less time because the covenant was not disclosed?]

It was not the duty of the vendor to disclose the covenant. At any rate the purchaser was not prompt enough.

[NORTH, J.:—The vendor could not have been misled; she knew that the purchaser was objecting to the title.]

He was objecting on other grounds.

But, if the purchaser had completed his purchase without notice of the covenant, he would not have been bound by it; it does not run with the land. It is his own fault that he has discovered the covenant; if he had abstained from making inquiries he would have known nothing of it. The rights as between the vendor and the purchaser ought not to be altered

(1) 43 Ch. D. 574, 584, 586.
(2) 16 Q. B. D. 778.
(3) 21 Ch. D. 95.
(4) 42 Ch. D. 23.
(5) Law Rep. 6 Ch. 428.

by reason of the purchaser's inquisitiveness. Would a vendor who had a good forty years' title be bound to investigate the entire title in order to ascertain whether the property was subject to any restrictive covenant? The doctrine of constructive notice cannot be carried back beyond forty years.

The covenant affects only an insignificant part of the property. In *In re Ebsworth & Tidy's Contract* (1), the covenant affected the whole of the property sold. The *onus* is on the purchaser to shew that the covenant materially affects the value of the property, and he has not done this. The case is one for compensation.

NORTH, J. (after stating the facts down to the sending of the purchaser's further requisitions on the 23rd of July, continued):—

It is clear from the requisitions sent on the 23rd of July, that at that time (probably it was on the day before), the purchaser's solicitors had had the deed of the 3rd of March, 1847, produced to them, and knew the substance of its contents. I think the fair inference to be drawn is, that the purchaser's advisers had seen that deed and had acquainted themselves with all that they thought material in it for the purpose with which they had to deal. I cannot accept the suggestion that they had only seen the plan of the property contained in it.

On the 23rd of July the further requisitions were sent, and there was no requisition relating to the contents of that deed beyond what I have read. Those requisitions were answered by the vendor on the 28th of July, and some further correspondence took place between the parties up to the 9th of August; and, on the 9th of August the purchaser's summons was issued, asking "that it may be declared that the requisitions and objections of the purchaser in respect of the title to the hereditaments comprised in the contract of sale have not been sufficiently answered by the vendor, and that a good title to the hereditaments has not been shewn in accordance with the particulars and conditions of sale." I read that as meaning, that the requisitions and objections have not been sufficiently answered, and that, by reason thereof, a good title has not been shewn. I cannot read the latter branch of the sentence as a separate objection, and I think

(1) 42 Ch. D. 23.

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it would be clearly too vague, except that the reference to the requisitions enables me to ascertain what the points in dispute between the parties really are. It would have been more convenient to refer to the requisitions by number, but I think that the latter part of the sentence, which asks for a declaration that a good title has not been shewn, refers to the points already in issue between the parties on the requisitions, and was not meant to throw at the head of the Court a general objection to the title, whether the parties had or had not already taken it *inter se.* After the summons was issued the long vacation intervened, and the principal affidavit in support was not made until October. It was filed on the 16th of October. In it the purchaser says he had obtained a copy of the deed of the 3rd of March, 1847, and he adds, "From the copy so obtained, it appears that *J. L. Cox* thereby entered into a restrictive covenant with respect to the buildings that might be erected on the site of the boiler-room and warehouse. If I had known of the existence of such covenant at the time of sending in my requisitions on the title, I should have required the vendor to procure the release thereof." Therefore, at that time he did clearly and explicitly state his objection that there was a restrictive covenant which must be released. I do not think he would have been entitled to say that he had rescinded the contract on that ground, but it is clear that he did then take the objection, although he gave the vendor an opportunity of procuring the release of the covenant.

It is not necessary to follow the proceedings any further. There are many points raised, as I understand by the requisitions, but this objection has been taken as a preliminary one, which, if it is decided in one way, will render it unnecessary to investigate the matter further. The purchaser says that he finds there is a covenant still in force restricting his right of building on the property, and that therefore he is entitled to say that a title has not been shewn to that which the vendor professed to sell to him, viz., the property free from incumbrances and without any restrictions, except in so far as notice of any restriction was given by the particulars. I think that an attempt has been made to take advantage of the purchaser, and I am not at all satisfied with the course which has been adopted on behalf of the vendor.

No affidavit has been made on her behalf, and it is not shewn that she has not in her possession at the present moment a duplicate or counterpart of the deed of the 3rd of March, 1847, one copy of which is in the possession of Messrs. *Farrer*. In the ordinary course of things she would have a copy of that deed, because it was a deed of exchange between adjoining owners of parts of their properties. The copy which Messrs. *Farrer* have, is the conveyance to *W. L. Farrer* of the part given up to him, and it also shews what was conveyed by *Farrer* to *Cox*. The deed conveying that property to *Cox* must necessarily have been in his possession, and there is nothing to shew that it is not at this moment in the vendor's possession. Under these circumstances the vendor's advisers did not choose to commence the abstract of title with the deed of 1847, which would have shewn a title going back forty-three years, but they choose to commence with the mortgage deed of July, 1852—not a very convenient document with which to commence a title—a mortgage only thirty-eight years old. And then it is said—I never heard such a contention before—"The purchaser has been too vigilant. If he had only refrained from making the inquiries which he thought fit to make, and had not thus acquired notice of the deed of 1847, but had taken a conveyance of the property, he would have obtained a good title as a purchaser for value without notice, and could not have been affected by the restrictive covenant." Therefore, it is said, that as it is only the purchaser's own inquisitiveness which has brought this upon him, the vendor ought not to be prejudiced by the inquiry which he thus made. I think it was the vendor's duty to tell the purchaser that this deed existed, and it is the vendor's fault, and not the purchaser's inquisitiveness, which has led to the disclosure. But I must say that I dissent entirely from the proposition that the purchaser would have taken the property free from the restrictive covenant, if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or, it would come to this,—that, if a man was content to purchase property on the condition that

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he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance. Of course the law does not allow of anything so absurd as that. If a purchaser chooses to take property with a thirty-eight years' title, without going any further back, he has, in my opinion, constructive notice of that which he would actually have known if he had required a forty years' title to be shewn, and had investigated the title during that period. And, when I say a forty years' title, I mean a title deduced for forty years, and for so much longer as it is necessary to go back in order to arrive at a point at which the title can properly commence. The title cannot commence *in nubibus* at the exact point of time which is represented by 365 days multiplied by 40. It must commence at or before the forty years with something which is in itself, or, which it is agreed shall be, a proper root of title.

Under these circumstances, I think the purchaser was fortunate in discovering that which it was the vendor's duty to tell him, but which the vendor abstained from telling him.

Then it is said, that the purchaser is precluded from raising the objection, and must be taken to have waived it, because he did not at the earliest possible moment after discovering it mention it to the vendor. In my opinion, the purchaser was under no obligation to do that. The conditions of sale provide, that the purchaser's objections and requisitions as to the title are to be sent to the vendor within fourteen days after the delivery of the abstract. That must mean objections and requisitions addressed to the abstract as then delivered, and, inasmuch as this covenant ought to have been, but was not, disclosed by the abstract, the purchaser is not to blame for not making a requisition upon a matter of which he then knew nothing. When did he discover the objection? I think he must be taken to have discovered it just before the 23rd of July. If I were at liberty to draw an inference, I should come to the conclusion that he did not know it then; because I think that, if he had then found it out, if he had at that time read through the deed of the 3rd of March, 1847, he would probably have made a requisition in respect of it. But I do not think I am at liberty to

draw that inference, and I must take it that he had constructive, if not actual, notice of the contents of that deed shortly before he sent in his requisitions on the 23rd of July. I do not see why, because he did not make a requisition on this point within twenty-four hours after he found it out, he is to be taken to have waived the objection. He was allowed fourteen days for making requisitions upon matters of which he had notice from the abstract in the ordinary way, and why he should be limited to a shorter time, because the vendor has deliberately abstained from setting out in the abstract that which she ought to have stated there, I do not see. I certainly will not hold that the purchaser was bound to send his requisition as to this covenant at once. I think he was bound to do so within a reasonable time, and, if it had appeared that the vendor was misled by the point not being taken before, the purchaser might be prejudiced by his delay. But I find no trace of anything of that sort here. It is clear that on other points, independently of this point, the parties were already at arm's length as to whether a good title had been shewn. They come to the Court on those points, and, long before they had reached the Court, this objection was fairly and explicitly taken. In my opinion, there was nothing whatever to preclude the purchaser from taking it by his affidavit at the time at which he did take it, or from persisting in it down to the present time. I hold that the objection is a good one, and that the purchaser is entitled to be relieved from his contract.

It was suggested that there is nothing to shew that the buildings upon the land affected by the covenant are now in the same condition as they were at the time when the covenant was entered into. Inasmuch as they were then described as "engine-house, boiler, and warehouse," and are still described in the same way in the particulars of sale, I cannot assume that any change has taken place in the interval.

Then it is said that the covenant relates to only a small portion of the property. It relates, in my opinion, to a material portion, and the effect of it is, to restrict the height to which the buildings on that portion can be raised, as to part of it to one story, and as to the remainder to two stories. And when property is situate in such a locality as *Great Queen Street*, close to

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Lincoln's Inn Fields, I cannot assume, in the absence of any evidence, that it is not capable of improvement so as to become more valuable by an alteration of the buildings. And, when I find that the purchaser swears that, if he had known of the covenant, he should have required the vendor to procure the release of it, that he has not been cross-examined upon his affidavit, and that no evidence on the question of materiality has been given by the vendor, I think that the purchaser has done all that is incumbent upon him in the first instance, and that I ought to be satisfied that the covenant is material.

I must, therefore, declare that the vendor has not made out a good title to the property.

Hadley, asked that the vendor might have an opportunity of obtaining a release of the covenant.

North, J.:—

The vendor had notice of the objection five months ago. If she had then submitted and asked for time, I should have given it, and should not have decided the point against her at once. But, as she chose to hold out for five months, I do not think I ought to give her any further time now. There will be the usual order for return of the deposit, with interest at 4 per cent., and the vendor must pay the purchaser's costs of investigating the title and of the summons.

Solicitors: *Hughes, Hooker, & Co.; Bockett, Stunt, & Nash.*

W. L. C.

In re HARTLEY.
NUTTALL *v.* WHITTAKER.

NORTH, J.
1891
March 20.

[1890 N. 1750.]

Practice — Default in Appearance — Delivery of Amended Writ — Rules of Supreme Court, 1883, *Order* XIX., *r.* 10; *Order* XXVIII., *r.* 10.

An amended writ may be delivered to a defendant who has made default in appearance, by filing it at the Central Office, personal service being unnecessary.

THE writ in this action was issued on the 9th of December, 1890. The Plaintiffs were *Edmund John Nuttall* and *Constance Irene Nuttall* an infant, beneficiaries under the will and codicil of *Edmund Hartley*. The Defendants were *James Whittaker, Betty Whittaker,* and *Noel Shore,* the three trustees of the will and codicil. The writ was indorsed with a claim for the appointment of new trustees of the will in the place of *James Whittaker* and *Betty Whittaker*; for a receiver; and costs against *James Whittaker* and *Betty Whittaker*. The Defendants, *James Whittaker* and *Betty Whittaker,* did not appear; the writ had been served upon them personally. Subsequent proceedings were filed against them in the Central Office. On the 19th of December, 1890, a receiver was appointed, and leave to amend the writ was given. The writ was amended by entitling the action, "In the matter of the Estate of *Edmund Hartley,* deceased," extending the claim in terms to the codicil as well as the will, and adding a claim for execution, so far as was necessary, of the trusts of the will and codicil.

The amended writ was filed but not otherwise served on the Defendants *James Whittaker* and *Betty Whittaker*. Judgment was given on the 31st of January, 1891, for administration, and directing the appointment of new trustees in the place of *James Whittaker* and *Betty Whittaker,* and ordering them to pay the costs of the action.

A motion was now made on behalf of the Defendants *James Whittaker* and *Betty Whittaker,* that they might be at liberty to enter an appearance and defend the action; (2.) that the

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judgment might be set aside as irregular on the ground that a copy of the amended writ was not served upon either of the applicants; (3.) that the Plaintiffs might be ordered to pay the costs of the motion.

The motion was supported by an affidavit by the applicants to the effect that they had neglected to pay proper attention to the process of the Court through ignorance, and in reliance on statements made by the testator in his lifetime, and that they had a good defence to the action.

Napier Higgins, Q.C., and *Church*, for the motion:—

An amended writ ought to be personally served. A person may very well allow proceedings to be taken against him without defending when, if additional relief were asked, he would appear and defend. It has been decided that where the indorsement is amended personal service of the amended writ is necessary: *The Cassiopeia* (1).

Cozens-Hardy, Q.C., and *Maidlow*, for the Plaintiffs:—

The case of *The Cassiopeia* was decided on the rules of 1875. In the Orders of 1883 the rules that apply are Order XIX., rule 10; Order XXVIII., rule 10; and Order LXVII., rule 4. Those orders provide for the delivery of an amended indorsement or pleading; the corresponding rules of the older orders did not refer to an amended indorsement. Order XVI., rule 13, provides for service of an amended writ when a defendant is added in the same way as an original writ is served on the new defendant only, implying that an amended writ is to be delivered, and need not be served, on an original defendant.

Napier Higgins, in reply.

NORTH, J.:—

I do not think that the proceedings here were, as to the delivery of the amended writ, irregular. The rules that apply are rule 10 of Order XXVIII., and rule 10 of Order XIX. The latter provides for delivery of "every pleading or other document

(1) 4 P. D. 188.

required to be delivered to a party or between parties" where appearance has been entered; "but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer." It is quite true the rule does not contain words relating expressly to any indorsement or pleading; but Order XXVIII., rule 10, provides, "whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same." I think that those rules have been complied with in this case. Some irregularities have been mentioned, but they are not such as to make any substantial difference.

I am told that the Defendants have evidence that they have a good defence to the action, and I am willing to allow them to have the order set aside; but only upon the terms that the Plaintiffs' costs from the time of filing the amended writ down to and including the trial, and any subsequent costs, including the costs of this motion, to be as between the Plaintiffs and these Defendants the Plaintiffs' costs in any event. I will direct that the account of debts and the proceedings already taken for the purpose of administration be adopted, but that no further proceedings beyond the adjudication on claims be taken without the leave of the Judge.

Solicitor for Applicants: *Church.*

Solicitors for Plaintiffs: *Wynne Baxter & Keeble,* agents for *Beldon & Ackroyd, Bradford.*

D. P.

NORTH, J.
1891
March 24.

In re ABSTAINERS AND GENERAL INSURANCE COMPANY.

[1891 A. 688.]

Company—Reduction of Capital—"Capital Lost or Unrepresented by Available Assets"—Preliminary Expenses—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11 [*Revised Ed. Statutes, vol. xv., pp.* 624, 625]—*Companies Act,* 1877 (40 & 41 *Vict. c.* 26), *s.* 3 [*Revised Ed. Statutes, vol. xviii., p.* 367].

Capital properly expended by a company in preliminary expenses cannot be treated as "lost capital or capital unrepresented by available assets," within sect. 3 of the *Companies Act,* 1877, so as to entitle the company to reduce its capital by the amount so expended.

PETITION by the above company asking that a special resolution for the reduction of the capital of the company might be confirmed by the Court.

The company carried on the business of life assurance. Its nominal capital was £250,000, divided into 250,000 shares of £1 each. Of these 80,000 had been issued, and the sum of 7*s.* 6*d.* had been called up. A valuation of the company's assets and liabilities made in the year 1890, pursuant to the *Life Assurance Companies Act,* 1870, shewed that the then present value of the liability of the company upon its policies issued during the preceding five years was £20,745 19*s.* 3*d.*, to meet which the company possessed a life assurance fund of £12,190 19*s.* 3*d.* only, leaving a deficiency of £8,555. The balance-sheet of the company for the year ending the 31st of December, 1890, shewed the expenditure of a sum of £15,452 17*s.* 7*d.* on preliminary expenses, agency establishment, and extension expenses.

The petition contained the following allegations:—

"The expenditure of this sum was necessary for the establishment of the company as an insurance office, but the amount thus expended cannot properly be considered an asset of the company. It is in fact so much lost capital, or capital unrepresented by available assets, and it is proposed to reduce the amount appearing in the balance-sheet of the company on this account by the

sum of £11,445, leaving £4,007 17*s.* 7*d.* only to the credit of the company on this account. To meet the deficiency of £8,555, and for the purpose of writing off the said sum of £11,445 from the said sum of £15,452 17*s.* 7*d.*, the company is desirous of cancelling share capital to the amount of £20,000, and reducing the nominal account of all the shares in the company's capital from £1 to 15*s.*" The articles of association contained power to reduce the capital. The following special resolution had been passed: "That the capital of the company be reduced from £250,000, divided into 250,000 shares of £1 each, to £187,500, divided into 250,000 shares of 15*s.* each, and that such reduction be effected by cancelling capital, which has been lost or is unrepresented by available assets, to the extent of 5*s.* per share upon each of the 80,000 shares which have been issued and are now outstanding, and by reducing the nominal amount of the unissued shares from £1 to 15*s.* per share."

The petition asked that the above resolution might be confirmed by the Court.

Cozens-Hardy, Q.C., and *Wurtzburg*, for the company:—

[NORTH, J.:—How can it be said that capital expended in preliminary expenses is "lost capital"?]

Sect. 3 of the *Companies Act*, 1877, says that the power to reduce capital conferred by the *Companies Act*, 1867, shall include a power to cancel not only "any lost capital," but also "any capital unrepresented by available assets."

[NORTH, J.:—If the company were transferring its business to another company, the goodwill would probably be an "available" asset of some value?]

It would only be available in the event of a transfer of the business.

NORTH, J.:—

I cannot confirm the resolution. I cannot take it simply on the statement contained in the petition that the capital which was expended on preliminary expenses is now "unrepresented by available assets." It would come to this, that every sum

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expended—and I will assume properly expended—by a company in preliminary expenses may be provided out of capital, and the company may then, simply because the money has been so spent, at once reduce its capital by that amount. I am not prepared to hold that that is intended by the Act. I must dismiss the petition.

Solicitors: *Sharpe, Parker & Co.*, agents for *Coleman & Co., Birmingham.*

W. L. C.

In re BRIGGS & SPICER.

STIRLING, J.

1891
Jan. 24;
Feb. 7.

[1890 B. 5515.]

Vendor and Purchaser—Voluntary Settlement—Sale by Trustees—Title—Possible Bankruptcy of Settlor—Avoidance of Settlement—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—27 *Eliz. c.* 4 [*Revised Ed. Statutes, vol. i., p.* 649].

Purchasers from the trustees of a voluntary settlement of freehold lands objected to the title on the ground that under sect. 47 of the *Bankruptcy Act,* 1883, the settlement would be void as against the trustee in bankruptcy of the settlor, if he should become bankrupt within two years of the date of the settlement, and would be void if he should become bankrupt within ten years of such date, unless the "parties claiming under the settlement" could shew that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property.

Upon a vendor's summons under the *Vendor and Purchaser Act,* 1874,

Held, that the purchasers would be "parties claiming under the settlement," and that the title could not be forced upon the purchasers:—

Held, also, that although a good title might possibly be made through the concurrence of the settlor, by his conveying to the purchasers and their paying the purchase-money by his direction to the trustees, yet such a title could not be forced upon unwilling purchasers; first, because the Court would not assist a settlor to get rid of his own settlement; and, secondly, because there was no means of ascertaining conclusively that the settlement was not in reality in the first instance, or had not subsequently become, a settlement for value.

THIS was a vendors' summons under the *Vendor and Purchaser Act,* 1874 (37 & 38 Vict. c. 78), seeking a declaration that a good title had been shewn to certain freehold lands at *Brixton* which by a contract dated the 21st of December, 1889, the vendors, *H. B. Briggs* and *C. Z. Hall,* with the concurrence of *J. J. B. Blackburn,* had agreed to sell to *T. L. Bristowe, Evan Spicer,* and *T. E. Knightley.* The purchasers were trustees for the *London* County Council, who intended to devote the land to the purposes of a public park.

From the abstract of the vendors' title the following facts appeared.

By a disentailing assurance dated the 17th of December, 1888, and inrolled in the Chancery Division of the High Court on the

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18th of December, 1888, *J. J. B. Blackburn*, who was tenant in tail in remainder expectant on the death of his father, *Joshua Blackburn*, of the land in question, conveyed to *H. B. Briggs* (*inter alia*) the land comprised in the contract, to hold the same unto the said *H. B. Briggs*, in fee simple, free and absolutely discharged from all estates tail of the said *J. J. B. Blackburn* therein, but subject to such particular estate as was then subsisting therein prior to the estate of the said *J. J. B. Blackburn*, and the estates, rights, interests, and powers, to take effect after the determination, or in defeasance of such estate tail, or subject to such of the same estates, rights, interests, and powers as the said *J. J. B. Blackburn* was unable by this indenture to bar, defeat, or destroy, to the use of the said *J. J. B. Blackburn* in fee simple.

By a voluntary settlement dated the 18th of December, 1888, *J. J. B. Blackburn*, as settlor, granted and conveyed to *H. B. Briggs* and *C. Z. Hall*, the vendors (*inter alia*), the property in question, subject to the life estate therein of *Joshua Blackburn*, to the use of the vendors in fee simple, upon trust to sell the same and pay the income arising from the investment of the proceeds of sale to *J. J. B. Blackburn* for life, and after his decease upon certain trusts in favour of his issue, and in default thereof upon certain trusts for the benefit of his brother and his three sisters.

Joshua Blackburn died on the 18th of December, 1888.

By a second disentailing assurance, dated the 22nd of December, 1888, and duly inrolled, *J. J. B. Blackburn*, in order to defeat all estates limited to take effect after the base fee created by the indenture of the 17th of December, 1888, and to confirm the estate created by the settlement of the 18th of December, conveyed the land comprised in the contract to the vendors in fee simple to the uses and upon the trusts of the settlement then subsisting or capable of taking effect.

Upon examination of the title the purchasers objected that the settlement of the 18th of December, 1888, was a voluntary settlement, and that under sect. 47 of the *Bankruptcy Act*, 1883 (1),

(1) Sect. 47 of the *Bankruptcy Act*, 1883, provides (sub-sect. 1) that—

"Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer

it would be void against the trustee in bankruptcy of the settlor should he become bankrupt on or before the 22nd of December, 1890, two years after the date of the second disentailing assurance, and might become void should he become bankrupt on or before the 22nd of December, 1898.

The vendors in answer to this objection tendered evidence that at the time of making the settlement *J. J. B. Blackburn* was able to pay all his debts without the aid of the settled property. This evidence consisted of an affidavit by Mr. *P. H. Hall*, a member of the firm of *Cooper, Walker, & Hall*, who had acted as solicitors and bankers of the settlor. He deposed that at the date of the settlement the settlor was in receipt of an allowance from his father, which was received by the firm, who remitted to the settlor the sum of £16 a fortnight for his current household and other expenses; that proper entries of the receipts and payments in respect of the allowance were made in the books of the firm; that at the date of the settlement the total amount of the settlor's indebtedness was £194 2*s.* 5*d.*; that the capital value of the property comprised in the settlement was at least £200,000 producing an income of £2625 4*s.* 6*d.*; and that he estimated the value of the life interest in this property at £42,000, or a reversionary life interest subject to the life of the settlor's father, who was then sixty-five years of age, at £28,900. This evidence was confirmed by that of the settlor himself, and of *E. H. Walker*, another member of the firm of solicitors. They contended that even if the settlement were liable to be avoided under sect. 47 of the *Bankruptcy Act*, 1883, such avoidance would not invalidate any conveyance of freehold hereditaments

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in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

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comprised therein, previously made by the trustees with the concurrence of *J. J. B. Blackburn*, to a purchaser for valuable consideration.

In reply to this the purchasers contended (1.) that the evidence offered by the vendors would not be available or sufficient to enable the purchasers as the parties claiming under the settlement to discharge the *onus*, under the 47th section of the *Bankruptcy Act*, 1883, of proving that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised therein, and that in fact no evidence could at the present time be given which would be available and sufficient for the purpose should *J. J. B. Blackburn* become bankrupt within the ten years mentioned in such section; (2.) that no sale by the applicants, either with or without the concurrence of *J. J. B. Blackburn*, would validate the settlement wholly or partially as against a trustee under his bankruptcy should he become bankrupt within the ten years.

Hastings, Q.C., and *Gaselee*, for the Vendors:—

The evidence which we have tendered of the settlor's ability to pay all his debts at the date of the settlement without the aid of the settled property is sufficient; and in the event of his subsequent bankruptcy the entries in Messrs. *Cooper & Co.'s* books would be admissible as evidence: *Ex parte Russell* (1); *Dart* on Vendor and Purchaser (2).

Although the section declares that the settlement shall be void, it does not follow that everything done under it is also void. It could not have been intended that a *bonâ fide* sale by the trustees of a voluntary settlement should be set aside by a trustee in bankruptcy, and the property recovered by him. It is the proceeds of sale that are settled, and the trustees can make a good title under the trust for sale.

The "parties claiming under the settlement" are the beneficiaries, and not the trustees. At any rate, the trustees and the settlor together can make a good title. The word "void" in sect. 47 means "voidable."

The Court will not decree specific performance where there is

(1) 19 Ch. D. 588. (2) 6th Ed. vol. ii. p. 1277, par. 6.

reasonable probability of litigation ensuing against the purchaser in respect of the matter in doubt: *Fry* on Specific Performance (1). Here we submit there is no such reasonable probability.

In *Spencer* v. *Topham* (2), a doubtful title was forced upon the purchaser. In *Ex parte Snowball* (3), it was held that a power of attorney is not for all purposes revoked by an act of bankruptcy, and that a sale under it to a purchaser who had no notice of an act of bankruptcy would be good as against the trustee under a subsequent adjudication. There is some analogy between that case and the present, for here the conveyance on trust for sale is equivalent to a power of attorney.

That principle was recognised by the Privy Council in *Elliott* v. *Turquand* (4).

Beale, Q.C., and *J. L. Casson*, for the Purchasers:—

The evidence offered by the vendors is insufficient, because the deponents may be dead at the date of the bankruptcy, or there may be other creditors in existence.

The Legislature has put this difficulty in the way of the title. We cannot tell what the trustee in bankruptcy may have in his hand when we have to uphold the settlement against him: *Ex parte Russell* (5); *Lowes* v. *Lush* (6); *Halifax Joint Stock Banking Company* v. *Gledhill* (7); *In re Holden* (8).

The "property" in sect. 47 means "the property settled by the settlement," not merely the proceeds of sale.

Hastings, in reply:—

The question is really whether there is a probability of litigation. And here there is none. It cannot be suggested that leases granted by the trustees of a voluntary settlement are liable to be avoided.

1891. Feb. 7. STIRLING, J. (after stating the facts, continued):—

The difficulty arises out of the provisions of sect. 47 of the

(1) Page 388.
(2) 22 Beav. 573.
(3) Law Rep. 7 Ch. 534.
(4) 7 App. Cas. 79.
(5) 19 Ch. D. 588, 602.
(6) 14 Ves. 547.
(7) [1891] 1 Ch. 31.
(8) 20 Q. B. D. 43.

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Bankruptcy Act, 1883. [His Lordship read sub-sect. 1 of the section, and continued:—]

It is admitted by the vendors that the settlement of December, 1888, falls within the class of settlements which under this section are liable to be avoided by a trustee in bankruptcy. Two years have elapsed since the date of the settlement; but it will, "if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement." The section appears to throw "on the parties claiming under the settlement" the burden of proving, as against the trustee in the bankruptcy of the settlor, that the settlor was at the time of making the settlement able to pay his debts without the aid of the property comprised in the settlement (see *Ex parte Russell* (1), especially the judgment of *Baggallay*, L.J.). Who, then, are included in the term "parties claiming under the settlement"? Plainly the beneficiaries, and also the trustees of the settlement. It is suggested, however, that purchasers and lessees who deal in good faith with the trustees are not so included. If the subject were under consideration by the Legislature, much, possibly, might be said in favour of exempting such purchasers and lessees from the heavy burden imposed by sect. 47, and leaving the trustee in bankruptcy his remedy only against the property for the time being subject to the trusts of the settlement. I have, however, simply to construe the section as it stands. The words are wide and unrestricted, "parties claiming under the settlement." The proceeds of sale may be lost, or circumstances may occur to induce the trustee to have recourse to the property originally in the settlement rather than to any substituted for it. A purchaser derives, and consequently claims, title under the settlement; he has notice from the circumstances of the case of the liability of the settlement to avoidance; and upon the fullest consideration which I have been able to give I have been unable

(1) 19 Ch. D. 588, 602.

to see good ground for holding such a purchaser not to fall within the language of the Act. This being the state of the title, is it one which a purchaser can be compelled to accept? He has cast upon him the burden when attacked by the trustee in bankruptcy of the settlor of proving that the settlor was, at the time of making the settlement, able to pay his debts without the aid of the property comprised in the settlement. If that issue could be decided now, and upon the materials before me, I should probably hold that the vendors had made out their case; but that appears to me to be beside the point. The party from whom the attack is to be feared is not now in existence, and he cannot be bound by any proceedings at the present time. The fact on which the title depends cannot be proved merely by documentary evidence. When the attack comes the purchaser must produce witnesses, who will establish, *primâ facie*, at all events, the ability of the settlor at the time of making the settlement to pay his debts. Those witnesses, however, are not under the purchaser's control; when they are wanted they may not be found, or they may be out of the jurisdiction, or possibly dead. Even if the purchaser should succeed in producing them, it is impossible to anticipate by what rebutting evidence their testimony may be met or what may be the effect of cross-examination; and the result may be that, even when a *primâ facie* case is made out in the first instance, the balance of evidence on the whole is so even that the purchaser may be held to have failed to discharge the *onus* of proof which lies on him. The rule as to titles the validity of which depend on the decision of questions of fact was thus stated by *Leach*, V.C., in *Emery* v. *Grocock* (1): "If the case be such, that sitting before a jury, it would be the duty of a Judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser." The present is an *à fortiori* case; and in my opinion the purchaser cannot be compelled to accept such a title.

It is said next that a title can be made through the concurrence

(1) 6 Madd. 54, 57.

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of Mr. *Blackburn* by his selling and conveying to the purchasers, and their paying the purchase-money by his direction to the trustees of the settlement. This would amount to an avoidance of the settlement by Mr. *Blackburn*, under the provisions of 27 Eliz., c. 4, and a re-settlement by him of the proceeds of sale. If the purchaser consented to accept a title so made, it seems to me it would be good. It has, however, been long settled that the Court will not force such a title on an unwilling purchaser: see *Smith* v. *Garland* (1); *Johnson* v. *Legard* (2); *Clarke* v. *Willott* (3). The reasons given are two—first, that the Court will not assist the settlor to get rid of the settlement which he has himself created; and, secondly, that there is no means of ascertaining conclusively that a settlement apparently voluntary was not in reality, in the first instance, or has not subsequently become, a settlement for value. The difficulty of ascertaining whether the settlement is to be treated as with or without consideration is none the less that, according to *Price* v. *Jenkins* (4), the consideration may be sufficient to prevent the settlor from availing himself of the provisions of 27 Eliz., c. 4, while it is insufficient to prevent the application of sect. 47 of the *Bankruptcy Act*, 1883: see *Ex parte Hillman* (5). In my judgment, therefore, the title cannot be forced on an unwilling purchaser.

Solicitors: *Cooper, Walker, & Hall; the Solicitor to the London County Council.*

(1) 2 Mer. 123.
(2) T. & R. 281.
(3) Law Rep. 7 Ex. 313.
(4) 5 Ch. D. 619.
(5) 10 Ch. D. 622.

W. W. K.

In re PRIDE.
SHACKELL *v.* COLNETT.

[1888 P. 563.]

STIRLING, J.
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April 14, 15.

Mortgage—Payment off by Supposed Owner of the Property—Effect as to Real Owner of a Share—Presumption as to Intention to keep Mortgage alive.

Where a person who claims to be owner of an equity of redemption, but whose title to a share of the property is disputed in a pending action, pays off the mortgage and takes a reconveyance, the Court will presume an intention to keep the mortgage alive as against the share in dispute.

In 1813, hereditaments were mortgaged by *A.*, and in 1850 the then owner devised them, subject to the mortgage, to his six children, including *P.* and *S.* *P.* acquired three of the six shares, and, in 1859, *S.* conveyed her share to *P.* In 1862, *S.* commenced a suit to set aside her conveyance. While the suit was pending, a deed was executed, which was on the face of it a reconveyance to *P.*, in consideration of his paying off the balance due on the mortgage, of five-sixths of the mortgaged property, and a transfer of the mortgage so far as it affected the sixth part, which he had not attempted to purchase.

A decree was afterwards obtained in the suit setting aside the conveyance of the share of *S.* :—

Held, that the mortgage was kept alive as against the share of *S.*

ANN ROWLAND, being seised of or entitled to certain houses, lands, and other hereditaments in the county of *Monmouth*, and certain tithes, by two deeds, dated respectively the 4th of May, 1813, and the 20th of August, 1813, mortgaged the same to secure two sums of £4000 and £600.

Ann Rowland died in August, 1838, having by her will devised the said mortgage premises on certain trusts, as to part thereof, in favour of her daughter *Elizabeth Hodges*, and, as to the rest of such hereditaments, in trust for her son *Thomas Pride* in fee simple.

Thomas Pride had six children, viz., *James Pride*, *Thomas Pride* the younger, *Ann*, the wife of *Henry Jones*, *Elizabeth Pride*, *Susan Pride* (afterwards *Susan Spring*), and *Sarah Pride* the younger.

Thomas Pride died on the 31st of January, 1850. By his will, dated the 29th of August, 1840, he gave certain personal estate to *James Pride*, subject to the payment of £200 to the testator's

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executors, which was to form part of his residuary personalty, and be paid on the death or marriage of his widow, *Sarah Pride*; and he gave all his residuary personalty, and all his real and leasehold estate, to his said widow during widowhood, and after her decease or marriage the testator (after disposing of certain real estate not including that to which he was entitled under his mother's will) gave the residue of his real and personal estate in equal sixth shares to the above-named six children, but directed certain sums to be deducted from some of the shares and divided among the children entitled to the other shares.

Between 1851 and 1861, *James Pride* acquired, by purchase or otherwise, the shares of *Thomas Pride* the younger, *Elizabeth Pride*, and *Sarah Pride*, in his father's residuary real and personal estate; and by a deed dated the 19th of April, 1859, and duly acknowledged, *Susan Spring*, for a valuable consideration, purported to convey her one-sixth share to *James Pride*. Her share was, however, subject to a settlement executed by her on her marriage in 1852.

Sarah Pride, the widow, died on the 26th of April, 1859.

In 1862, *Susan Spring* commenced a suit in Chancery against *James Pride* and others, to have the deed of 1859 set aside.

By a deed dated the 1st of February, 1864 (executed while the suit was pending, and before decree), and made between *J. D. Gray* and *W. Brice* (who were the successors in title of the mortgagees for £4000), of the first part, *T. H. Morgan* (who was the successor in title of the mortgagee for £600) of the second part, *Elizabeth Hodges* of the third part, *Henry Jones* and *Ann* his wife of the fourth part, and *James Pride* of the fifth part, after reciting the mortgages and other previous dealings with the property, and that *James Pride* had become entitled to five sixth parts of the testator's residuary real and personal estate (subject to two sums charged by the will), and that *Henry Jones* and *Ann* his wife, had become entitled to the remaining sixth part, subject as to the entirety of the freehold mortgaged hereditaments to the above-mentioned mortgages, and subject as to *Ann Jones's* share to the sum of £200 made payable by *Thomas Pride's* will, and reciting that £300, part of the said sum of £600, had been

paid to *T. H. Morgan*, and that part of the mortgaged heredita-ments included in *Thomas Pride's* residue had been sold free from the mortgages to one *Williams*, the purchase-money being received by *James Pride* and *Henry* and *Ann Jones*; and reciting an arrangement under which *Elizabeth Hodges* was to pay *J. D. Gray* and *W. Brice* £2000, and have a reconveyance of her portion of the mortgaged premises, and *James Pride* was to pay them the other £2000, as to £1666 13*s.* 4*d.* (five-sixths thereof), in discharge of the like portion of their mortgage debt to which he was primarily liable in respect of his five sixth shares, and as to £333 6*s.* 8*d.* (one-sixth) as the consideration for the transfer to him of their security for the like portion of the said mortgage debt, so far as regarded the remaining one-sixth of the hereditaments, and that in consideration thereof he was to have a reconveyance of such of the mortgaged hereditaments as formed part of *Thomas Pride's* residue, as to five-sixths thereof, for his own absolute use and benefit, and as to the remaining one-sixth, subject to such equity of redemption as the same might be subject to on payment by *Henry Jones* and *Ann*, his wife, of £333 6*s.* 8*d.* and interest, and reciting that *Elizabeth Hodges* had paid *J. D. Gray* and *W. Brice* the sum of £2000, a moiety of the sum owing on their mortgage, and had paid *T. H. Morgan* the balance of £300 owing on his mortgage, and that *James Pride* had paid the balance of £2000 due to *J. D. Gray* and *W. Brice* on their mortgage, and that by a deed of even date the portions of the mortgaged property belonging to *Elizabeth Hodges* had been reconveyed to her: It was witnessed that in consideration of £2000 to *J. D. Gray* and *W. Brice*, paid by *James Pride*, at the request and by the direction of *Henry Jones* and *Ann*, his wife, and in consideration of the two sums of £300 paid to *T. H. Morgan*, *J. D. Gray*, *W. Brice*, and *T. H. Morgan* reconveyed, and *Elizabeth Hodges* released, such portions of the mortgaged hereditaments as had not been sold and conveyed to purchasers, or reconveyed to *Elizabeth Hodges*, unto and to the use of *James Pride*, his heirs and assigns, freed and discharged from all claims and demands of the several persons parties thereto of the first four parts, but subject, as to the one-sixth part or share thereof of *Henry Jones* and *Ann*, his wife, to such right or equity of redemption as existed

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in favour of them on payment of the said sum of £333 6*s.* 8*d.* and interest, and of the sum of £200 payable according to the direction of *Thomas Pride's* will, and the interest thereof, and subject also as to the same one-sixth part to such or the like powers, provisoes, declarations, and agreements as were by or in the mortgage for £4000 declared or contained, concerning the entirety of the mortgaged hereditaments, for securing the sum of £333 6*s.* 8*d.* and interest (as part of the said sum of £4000 and interest originally secured thereby), and which said powers, provisoes, declarations, and agreements it was thereby agreed and declared should, so far as regarded the same one-sixth share, be and continue in full force and effect, and be as available by *James Pride*, his heirs, executors, administrators, or assigns respectively, for securing to him, his executors, administrators, or assigns, payment of the £333 6*s.* 8*d.* and interest, as if the same had been inserted therein, and had been expressly entered into or given to *James Pride*, his heirs, executors, administrators, or assigns, in regard to the same one-sixth share for such purpose.

On the 17th of February, 1864, *Susan Spring* obtained a decree from Vice-Chancellor *Wood* setting aside the deed of the 19th of April, 1859, but directing an account of her share of the personal estate and of the rents and profits of the real estate under her father's will, come to the hands of *James Pride*, and an account of the moneys advanced by him to her or by her sole direction; and that her remainder in such property expectant upon her coverture should be charged with what upon the balance of accounts should be found due to *James Pride*. This decree was affirmed on appeal: *Spring* v. *Pride* (1).

James Pride died on the 31st of May, 1877. *Frederick Shackell* had in the meantime been appointed the trustee of *Susan Spring's* marriage settlement, and she and her trustee commenced the present action in 1888 against the trustees and executors of *James Pride's* will, alleging that they were in possession of her one-sixth share of *Thomas Pride's* residuary real and personal estate, and claiming accounts of such share and of the income thereof, and the receipts and payments by the Defendants in

(1) 4 D. J. & S. 395.

respect thereof, and payment by them of what should be found due.

The judgment at the trial on the 30th of May, 1889, directed an inquiry whether the two mortgages affected *Susan Spring's* one-sixth share, and what was due to the Defendants in respect thereof; and the Chief Clerk, by his certificate, found that neither of such mortgages affected her share or any part thereof.

The Defendants took out a summons to vary the certificate by certifying (*inter alia*) that the two mortgages did affect *Susan Spring's* one-sixth share, and that there were due to the Defendants in respect thereof certain sums mentioned in the certificate; and this summons was adjourned into Court.

Hastings, Q.C., and *Frederic Thompson*, in support of the summons:—

The Defendants are tenants in common with *Susan Spring* of the property which was in mortgage. *James Pride*, having taken a conveyance of her share, paid off the balance due on the mortgages, and taken a reconveyance to himself believing himself to be entitled to *Susan Spring's* share, the question is, whether she can take advantage of *James Pride's* payment off, and say the mortgage no longer exists. Interest has been charged and allowed in the accounts treating the mortgages as still existing. It would be absurd to suppose that *James Pride* meant by paying off the mortgages to benefit the one-sixth share of a hostile litigant. He could not then make her contribute her share of the mortgage money. If a man gets in a mortgage, believing the property to be his own, and no reason exists for keeping the charge alive, and there is no express declaration of an intention to keep it alive, equity will presume that the intention was to destroy the charge; but if there is any reason for keeping it alive, equity will not destroy it: *Adams* v. *Angell* (1). In each case it is a question of intention, and when a tenant in tail satisfied a charge under the erroneous supposition that he was tenant in fee simple, the charge was held not to be extinguished for the benefit of the estate: *Earl of Buckinghamshire* v. *Hobart* (2). Where the owner of an

(1) 5 Ch. D. 634. (2) 3 Swans. 186, 202.

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estate subject to an executory devise paid off a charge, and the executory devise took effect, his executors were declared entitled to have the charge raised out of the estate: *Drinkwater* v. *Combe* (1). And a tenant in tail who was restrained from alienation, and who had paid off a charge on the estate, no declaration of his intention being expressed, was held to be in the same position as a tenant for life: *Countess of Shrewsbury* v. *Earl of Shrewsbury* (2).

Birrell, for the Plaintiffs:—

The accounts were delivered in an improper manner, and the Plaintiffs never saw the deed of reconveyance till after the commencement of the action. In *Earl of Buckinghamshire* v. *Hobart* (3) there was an outstanding term; but here there is an absolute reconveyance. The mortgage debt, as a debt, is gone. If there ever was an equity, it has been barred by lapse of time.

Hastings, in reply.

STIRLING, J.:—

In this case a summons has been taken out to vary the certificate of the Chief Clerk made in pursuance of a judgment directing (1.) an inquiry whether two mortgages affect the one-sixth share of the Plaintiff, *Susan Spring*, in the testator's residuary real and personal estate, and what is due to the Defendants in respect thereof, and (2.) an account of the rents and income of such one-sixth share received by the Defendants. Two questions have arisen, one of which is whether the two mortgages are still subsisting; and the Chief Clerk has found that they are not.

Dealing first with the mortgage for £2000, the facts are, shortly stated, as follows: *Thomas Pride* was the father of the Plaintiff *Susan Spring*, and he had five other children. By his will he divided his residuary real and personal estate amongst his six children—in nearly but not quite equal shares—certain sums of money being charged on some of the shares. Subject to

(1) 2 S. & S. 340. (2) 1 Ves. 227.
(3) 3 Swans. 186, 202.

the payment of these sums the property was given in equal sixth shares among the children, *James Pride* taking one sixth share and *Susan Spring* another. Part of the property consisted of land and tithes, which, with other property not belonging to the testator, was subject to two mortgages originally given to secure two sums of £4000 and £600. Prior to the date of the reconveyance, to which I shall presently refer, the amounts due on these mortgages had been reduced to £2000 and £300. *James Pride* had from time to time acquired the shares belonging to his brother and some of his sisters, and in April, 1859, *Susan Spring* executed a deed by which another one-sixth share was vested in *James Pride.* In short, if all the deeds were good, he had become possessed of the whole of his father's residuary estate (except that of *Ann Jones*) subject to the two mortgages.

Susan Spring in 1862 commenced a suit to set aside the sale of her one-sixth share to *James Pride*, and in the beginning of 1864 that suit had not been heard, but was on the point of being heard; the decree giving relief in that suit was made on the 17th of February, 1864. On the 1st of February, 1864, a deed was executed to which the first and second mortgagees, *Elizabeth Hodges, Henry Jones* and *Ann* his wife, and *James Pride* were parties. This deed was in form a reconveyance to *James Pride* of the whole of the mortgaged hereditaments which formed part of *Thomas Pride's* residuary estate, but as to one sixth share thereof subject to a right of redemption in favour of *Henry Jones* and *Ann* his wife on payment of one-sixth of the £2000 paid off by *James Pride.* Therefore, on the face of the deed, there was an absolute reconveyance to *James Pride* of five-sixths of the property, including the one-sixth of *Susan Spring*, discharged from the mortgages. Did that put an end to the mortgage for £2000?

The late Master of the Rolls, in *Adams* v. *Angell*, said (1): "In a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance.

(1) 5 Ch. D. 645.

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Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

The question here is, under which branch of the rule laid down by Sir *George Jessel* the case falls—whether under that which applies when a tenant for life pays off a charge, or under that which is applicable when the owner in fee or a tenant in tail pays it off. Even in the case of a tenant in tail, if the estate cannot be barred, the rule that the charge is not presumed to be kept alive does not apply; that was decided by Lord *Thurlow* in *Countess of Shrewsbury* v. *Earl of Shrewsbury* (1). In the case also of an owner in fee paying off a charge there is one case in which an intention to destroy the charge will not be presumed, viz., where the estate is subject to an executory devise over: *Drinkwater* v. *Combe* (2).

The presumption in either of these cases is that the intention is to keep the charge alive, because to keep it alive is for the benefit of the person who pays it off. Here the owner of five sixth shares of the estate was paying off the charge pending a suit to set aside the sale of one sixth. What is the presumption in such a case? It must be that the person paying off the charge intended to keep it alive as regards that one-sixth, because that is for his benefit; he cannot be presumed to have meant to benefit the person who was seeking to impeach his title.

In my opinion, I ought to follow what is laid down in *Countess of Shrewsbury* v. *Earl of Shrewsbury* and *Drinkwater* v. *Combe*, and apply the rule which is applicable when a tenant for life pays off a charge on the inheritance without expressly declaring

(1) 1 Ves. 227. (2) 2 S. & S. 340.

his intention. Therefore, as to the mortgage for £2000 the intention to keep it alive must be presumed.

But it is not necessary to rest the case on presumption. [His Lordship then examined the accounts furnished and other evidence, which in his opinion shewed that *James Pride* had intended, and shewn his intention, to keep both mortgages alive, and that *Susan Spring* could not have been ignorant of what had been done; and varied the Chief Clerk's certificate on both the points raised.]

Solicitors: *Field, Roscoe, & Co.*, agents for *G. F. Hill, Cardiff; A. Hunt*, agent for *A. H. Oliver, Newport, Monmouthshire.*

F. E.

KEKEWICH, J.

1891

Feb. 6.

GREENWOOD *v.* TURNER.

[1890 G. 1399.]

Vendor and Purchaser — Specific Performance — Purchaser in possession— Acceptance of Title—Objection to Title—Purchase-money—Payment into Court—Option to give up Possession—Security for Purchase-money.

Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase-money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the Court will not, on a motion by the vendor in an action for specific performance, order him to pay the balance of purchase-money into Court without giving him the option either of retiring from possession on a certain day or of paying the balance into Court on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract and has made no objection to the vendor's title; but that option will not be given if the purchaser has done anything to prejudice the value of the property as a security for the balance.

By an agreement in writing dated the 22nd of August, 1889, and made between the Plaintiffs of the one part, and the Defendant of the other part, the Plaintiffs agreed to sell, and the Defendant agreed to purchase, a freehold messuage called *Elm House, Lavender Hill, Surrey*, for £5000, subject to an alleged subsisting lease to one *Steward* for fourteen years from the 24th of June, 1876. By the terms of the agreement the sum of £4750, being the purchase-money remaining over and above a deposit of £250 paid by the Defendant upon the execution of the agreement, was to be paid on the 24th of June, 1890, the day fixed for completion; and if from any cause whatever the purchase should not be completed on that day, the Defendant was to pay interest on his unpaid purchase-money at the rate of 4 per cent. per annum from that day until completion.

At the date of the agreement the Defendant was in the occupation of the house under what he said was a "lease" granted to him in 1882 by *Steward*, and the date fixed for completion of the purchase was the date on which his "lease" and also *Steward's* lease would expire.

The Plaintiffs delivered their abstract of title to the Defendant; but he made no objection or requisition within the time allowed for that purpose by the agreement, or at any time afterwards. Beyond payment of the deposit he did nothing towards completion, but continued in possession after the day fixed for completion. In consequence of his refusal to pay either the balance of his purchase-money or any interest or rent, the plaintiffs commenced this action claiming specific performance, alleging that the Defendant had accepted the title. The Defendant delivered a defence denying that he had accepted the title, and alleging that the Plaintiffs were selling as trustees of a will, and that they had been improperly appointed trustees and were unable to give a valid receipt for the purchase-money. The action now came on upon a motion by the Plaintiffs that, the Defendant having accepted the title to the property and being in possession thereof, he might be ordered to lodge the balance of purchase-money in Court to the credit of the action within four days after service of the order on the motion, together with interest thereon at 4 per cent. per annum from the 24th of June, 1890, to the date of payment.

In opposition to the motion, the Defendant filed an affidavit admitting that he had continued in possession on the expiration of his "lease" from *Steward*, but denied that he had done so under the purchase agreement; and he thereby offered to pay rent at the rate of the rent reserved by his "lease" from the 24th of June, 1890, to *Steward* or the person entitled thereto, or to bring the amount into Court, but without prejudice to the defence raised by him in the action.

Warmington, Q.C., and *Dauney*, for the Plaintiffs:—

We submit we are entitled to an order for payment into Court of the balance of the purchase-money. The Defendant having accepted our title cannot be allowed to elect either to give up possession or to pay the money into Court. He only has that option when he has objected to the vendor's title: *Crutchley* v. *Jerningham* (1); *Tindal* v. *Cobham* (2); *Gibson* v. *Clarke* (3);

(1) 2 Mer. 502. (2) 2 My. & K. 385.
(3) 1 V. & B. 500.

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Clarke v. *Wilson* (1); *Sugden* on Vendors and Purchasers (2); *Fry* on Specific Performance (3).

Theobald, for the Defendant:—

Payment in cannot be ordered at the instance of a vendor unless the purchaser is in possession under the contract. Here he was in possession under the title of a third person. At any rate, even if his possession is under the contract, the Court will give him an option of retiring from possession, he having done nothing to interfere with the value of the property: *Lewis* v. *James* (4).

Warmington, in reply.

KEKEWICH, J.:—

I feel strongly tempted to make this order, because I cannot help thinking that the purchaser has retained possession as long as he could and, but for this action, would have retained it still. That is to say, he is endeavouring, as far as possible, to have the benefit of the contract by retaining the estate, and yet retaining the purchase-money. If I could find any authority to support me I would make the order with great readiness; but my recollection of the practice of the Court, and the cases, combine to prevent me from making it. If I did so, I should be establishing a new rule.

In *Lewis* v. *James* Lord Justice *Cotton* states the rule, which is well known, and I only take it from that case because it is expressed in plain terms and in better language than I could frame. He says, "This is in some respects like a case where a purchaser being in possession is required to pay into Court, if he remain in possession, the purchase-money agreed upon, but it is well known that in such a case under ordinary circumstances an option is given to the purchaser to go out, and the order only is that if he continues in possession he must pay the price into Court. But that is not necessarily the only order which the Court can make in such a case. Special circum-

(1) 15 Ves. 317.
(2) 14th Ed. p. 229.
(3) 2nd Ed. pp. 608, 609.
(4) 32 Ch. D. 326, 330.

stances may vary it." And then he refers to two cases of *Cutler* v. *Simons* (1) and *Pope* v. *Great Eastern Railway Company* (2), the latter of which illustrates a large number of cases shewing that where the purchaser remains in possession, unless the property is kept intact, or preserved in its right state, so as to be a security for the purchase-money, the Court has insisted on its being paid into Court. Lord Justice *Cotton* then states the principle to be, as I have said, that "although under ordinary circumstances a purchaser in possession has the option of going out, and is not ordered to pay the purchase-money unless he elects to stay in, yet where he has done that which has interfered with the value of the property, the Court does not give him the option."

Turning to the other cases, I find, in all of them, that the purchaser had the option of retiring from possession. It is said that in all the cases there was an objection to the title. There was an objection in *Clarke* v. *Wilson* (3) and also in *Tindal* v. *Cobham* (4). In *Gibson* v. *Clarke* (5) there were extremely special circumstances, because the purchaser was let into possession in the confidence that a good title would be immediately made out, and that confidence was not made good through what came on both vendor and purchaser as a surprise. Lord *Eldon* said the purchaser must pay the money or restore the land; and the order, which was made by agreement, was that the purchaser should restore possession, accounting for the rents, without prejudice to any question between the parties. I find no rule nor anything approaching to a rule that where a purchaser has taken and is retaining possession, even though he has done so under the contract, he is bound to pay the money into Court, unless under such circumstances as I have mentioned; and if I so decided, and held that the purchaser had no option, I think I should be extending the rule.

I shall therefore order the purchaser to give up possession on the 6th of March, or else on that day to pay the purchase-money into Court.

(1) 2 Mer. 103.
(2) Law Rep. 3 Eq. 171.
(3) 15 Ves. 317.
(4) 2 My. & K. 385.
(5) 1 V. & B. 500.

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Warmington, for the Plaintiffs, then asked for interest on the purchase-money according to the terms of the contract.

Theobald, for the Defendant, contended that this would be inconsistent with the option allowed to him, and that, at all events, such an order ought not to be made on the motion.

KEKEWICH, J.:—Such an order was made in *Tindal* v. *Cobham* (1) and in *Gibson* v. *Clarke* (2). The Defendant is claiming to have the benefit of nearly nine months' possession for nothing.

The order will be that the Defendant elect to pay the purchase-money into Court by the 6th of March next—that is, within one month from to-day, or to give up possession on that day. If he then gives up possession, he must pay to the Plaintiffs interest at 4 per cent. on the purchase-money from the 24th of June, 1890, to the 6th of March next.

The costs of the motion will be costs in the action.

Solicitors: *E. Hilder; Pontifex, Hewitt, & Pitt.*

G. I. F. C.

KEKEWICH, J.
1891
Feb. 20.

McMAHON *v.* NORTH KENT IRONWORKS COMPANY.

[1891 M. 496.]

Practice—Debenture-holders' Action—Company—Insolvency—Receiver—Mortgage—Protecting Security—Principal and Interest not immediately payable.

Upon the principle that a mortgagee is entitled to the protection of his security, the Court will, at the instance of a debenture-holder of a limited company, where the debenture creates a charge on the property and assets of the company, appoint a receiver of the property so charged, if the security is in jeopardy through the insolvency of the company, even though the principal secured by the debenture is not immediately payable and default has not yet been made in payment of interest.

THIS was an action by the Plaintiff, on behalf of himself and all other, the holders of first mortgage debentures of the Defendants, the *North Kent Ironworks Company, Limited*, to enforce their securities. Each of the first mortgage debentures

(1) 2 My. & K. 385. (2) 1 V. & B. 500.

was for £100, and stated that the company would, "on the 1st day of January, 1892, or on such earlier day as the principal moneys hereby secured become payable, in accordance with the conditions endorsed hereon," pay to the registered holder £100; and that the company would in the meantime pay interest half-yearly at 5 per cent. per annum: and the company thereby charged, by way of floating security, all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being, with the principal moneys and interest thereby secured. The "conditions" referred to in the debenture provided that it should rank as a first charge and be a floating security; also that the principal moneys thereby secured should "immediately become payable (*a*) if the company makes default for six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing calls in such principal money; or (*b*) if an order is made, or an effective resolution is passed, for the winding up of the company."

The company was possessed of freehold land and works at *Erith;* but, owing to its having become insolvent, the works had been recently closed and the men discharged. A petition for winding up the company had been presented by a creditor, who claimed a lien on part of the company's property, but the hearing had been adjourned at the request of the company to enable them to take steps for passing resolutions for a voluntary winding-up, and the petition was still pending. It was, in fact, admitted that the company was wholly insolvent. Under these circumstances the Plaintiff now moved for the appointment of a Mr. *Young* as receiver of all the property and assets comprised in the debentures; the ground alleged for the motion being that other creditors besides the petitioning creditor were commencing or threatening actions against the company for the recovery of their debts, and that it was absolutely necessary for the protection of the debenture-holders' security that a receiver should be appointed immediately.

It appeared that no actual default had yet been made in any half-yearly payment of interest under the debentures.

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The application was supported by the usual affidavits of fitness as to Mr. *Young*.

Marten, Q.C., and *Eve*, for the Plaintiff:—

Although there has been no actual default in payment of interest, and the principal is not immediately payable, yet a present charge exists; and the debenture-holders are entitled to have their existing security, which is now obviously in jeopardy, protected. In *In re Panama, New Zealand, and Australian Royal Mail Company* (1), where the interest on debentures was in arrear, but the time for payment of the principal had not yet arrived, Lord Justice *Giffard* held that a debenture comprising all the undertaking of the company gave the holder a present charge entitling him to priority over other creditors; but it does not appear from the report whether, if interest is not in arrear, although the company may be practically insolvent and so unable to go on, the debenture-holder may nevertheless interfere. There is no reported case exactly in point; but in a recent unreported case of a similar nature, of *Morrison* v. *Railway Share Trust*, Mr. Justice *North* made an order such as that now asked for. Upon principle, a mortgagee is entitled to have his security protected, if it is in jeopardy, such as if waste is taking place. Here the appointment of a receiver would be for the benefit of every one.

Mr. *K. H. Leach*, for the Defendant company, did not oppose the application.

KEKEWICH, J.:—

In my opinion, upon principle, the application is right, though I am not aware of any direct authority upon the point. As a matter of principle a mortgagee has a right to the protection of his security if it is in jeopardy. Accordingly, I appoint Mr. *Young* receiver of the property and assets of the company comprised in the Plaintiff's security until judgment or further order.

Solicitors: *Slaughter & May; C. T. Whinney.*

(1) Law Rep. 5 Ch. 318.

G. I. F. C.

In re NATIONAL WHOLE MEAL BREAD AND BISCUIT COMPANY.

KEKEWICH, J.

1891 March 7.

Company—Winding-up—Practice—Petition—Amendment—Re-advertisement of Amended Petition.

Where a petition praying that the voluntary winding-up of a company might be continued under the supervision of the Court was subsequently amended by praying in the alternative for a compulsory winding-up order:—

Held, that the petition must be re-advertised.

A petition praying that the voluntary winding-up of the above-named company should be continued under the supervision of the Court was presented and duly advertised.

Objections having been raised that an irregularity had been committed in reference to the meeting of the company confirming the resolutions for voluntary winding-up, the petition was amended by praying in the alternative for a compulsory winding-up order. Upon the petition coming on for hearing the question was raised whether it ought not to be re-advertised.

Warmington, Q.C., and *Benn*, for the Petitioners:—

There is no necessity for the re-advertisement of the petition. In the case of *In re Electric and Magnetic Company* (1), it was held that on a petition for a supervision order a compulsory order might be made if the petitioners were willing. That case was followed in *In re United Bacon Curing Company* (2), where Mr. Justice *North* made a supervision order upon a petition praying for a compulsory order, and held that re-advertisement was not necessary. [They referred to *Buckley* on Companies (3).]

Renshaw, Q.C., and *Macnaghten*, for the company:—

We submit that the petition ought to be re-advertised. In the case of *In re Marezzo Marble Company* (4) (referred to in

(1) 50 L. J. (Ch.) 491; 44 L. T. (N.S.) 604; 29 W. R. 714.

(2) W. N. (1890) p. 74.

(3) 6th Ed. pp. 337, 673, 702.

(4) 43 L. J. (Ch.) 544; 29 L. T. (N.S.) 720; 22 W. R. 248.

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Buckley (1)), where the advertisements of a winding-up petition had been headed in the matter of the *Companies Act*, 1862, only, Sir *George Jessel*, M.R., refused, although the company consented, to make a supervision order, and directed the petition to stand over, with liberty to issue fresh advertisements entitled in the *Companies Acts*, 1862 to 1868. The case where a compulsory order is prayed for in the first instance rests on a very different footing from that in which the petition asks only for a supervision order. In the latter case creditors or other persons interested seeing the advertisements might be content with that, and not care to appear, although they might desire to oppose the making of a compulsory order. [They referred also to *Buckley* (2).]

Warmington, in reply:—

It may be doubted whether the recent order under the *Companies* (*Winding-up*) *Act*, 1890 (53 & 54 Vict. c. 63), is within the powers of that Act except so far as relates to compulsory winding-up.

KEKEWICH, J.:—

I take it that the intention of the rules as to the advertising of winding-up petitions is that the petition which is heard shall be advertised—that is to say, that which is advertised and that which is heard shall be substantially the same petition. Slips of course may be corrected; other amendments may be introduced from time to time; but whenever such amendments affect the substance of the petition, then, according to my experience, it has certainly always been the practice of the Court to insist upon fresh advertisements of the petition; and in the case to which Mr. *Renshaw* called my attention, referred to in *Buckley* on Companies, the late Master of the Rolls, Sir *George Jessel*—who I may venture to say was as well acquainted with the practice of the Court as any Judge who ever sat on the bench, and who never pushed the practice hard where the substance of the matter was against it,—where the petition was entitled merely in the *Companies Act*, 1862, refused to make a

(1) 6th Ed. p. 673. (2) 6th Ed. p. 764.

supervision order, and directed that the petition should stand over with liberty to issue fresh advertisements. His Lordship in that case certainly thought that something was required to be made known to the public, and that he had not got before him in substance the petition which had been advertised. It is no doubt a common practice on the hearing of a petition for the winding up of a company where there is a voluntary winding-up to make a supervision order, notwithstanding that the petition only asks for a compulsory order. Mr. Justice *North*, in the case of *In re United Bacon Curing Company* (1), seems to have thought that in such a case it was better to amend; and there is great convenience, as we all know, in making the petition accord with the order, care being taken that the petition should be in such terms that the order may be drawn up in accordance with it. The practice, however, has been not to insist upon the amendment, notwithstanding the convenience of it. And the reason seems obvious. On a winding-up petition, whether presented by the company or contributories or creditors, creditors or contributories may appear and support or oppose. If the petition asks for a compulsory order and then it is urged that a supervision order should be made, creditors are not in any way injured because they can only insist on a compulsory order if a supervision order would be an interference with their rights, and the contributories would be bound by the special resolution which authorized the voluntary winding-up. I do not think that in the converse case the same remark applies. When a petition is presented for a supervision order contributories who have assented to that are bound by their assent; but they may oppose a compulsory order. They may say that it is against their interest, that they have a voice in the matter and will not allow it; and creditors, of course, may support or oppose a compulsory order, notwithstanding they are not prepared to object to a supervision order. I think they ought to have an opportunity of coming in, and that the object of the rules would not be attained if I allowed this petition to proceed without fresh advertisements.

Solicitors: *Newson & Dunn; F. Bradley.*

(1) W. N. (1890) p. 74.

KEKEWICH, J.

1891 March 14, 17.

In re OPERA, LIMITED.

Mistake of Law—Officer of the Court—Company—Winding-up—Execution—Assets increased by Honest Mistake of Sheriff—Right of Sheriff to recover Money paid.

If the assets in the hands of an officer of the Court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognize the rules of honesty as between man and man, and to act accordingly.

Previously to the presentation of a petition for the winding-up of a company, the sheriff was in possession of goods of the company which he had seized under writs of *fi. fa.* Subsequently to the presentation of the petition, the sheriff, in the honest belief that he was justified in so doing, seized the money paid at the doors of the company's theatre, and thereout paid the execution creditors, and his own costs, and handed a small sum to the provisional liquidator, who accepted the same. The sheriff afterwards gave up possession of the goods. A winding-up order was made, and on the application of the official liquidator the sheriff was ordered to refund the money seized by him (less the sum paid to the provisional liquidator) on the ground that the seizure was wrongful. The goods having been sold by the official liquidator:—

Held, that the official liquidator must be ordered to pay out of the moneys received by him for the sale of the goods the amounts due to the sheriff for levy and charges on the writs, and the sheriff's costs of the application for such order.

Ex parte James (1) and *Ex parte Simmonds* (2) considered and followed.

ADJOURNED SUMMONS.

The *Opera, Limited*, was a company formed under the *Companies Acts*, for the purpose of carrying on the business of *Her Majesty's Theatre*. The company had issued numerous debentures, affecting their undertaking and other real and personal property, by way of floating security, but containing no express provision for the appointment of a receiver by or on behalf of the debenture-holders.

On the 16th of January, 1890, a writ of *fieri facias* was lodged with the sheriff of the county of *London*, for the levy against the goods of the company at the suit of *Charles Alias*, of the

(1) Law Rep. 9 Ch. 609. (2) 16 Q. B. D. 308.

sum of £628 16*s.*, the sheriff's officer being instructed on behalf of the judgment creditor to retain possession and not to interfere with the takings at the doors of the company's theatre, at which the pantomime of *Cinderella* was at that time being performed. On the same day, the sheriff seized under the writ, goods and chattels at the theatre belonging to the company, and he continued in possession under this writ and other writs subsequently mentioned, until the 10th of February, 1890.

On the 17th of January, 1890, another writ of *fieri facias* sued out by one *Calderwood*, in respect of a judgment debt of £45 due from the company, was lodged with the sheriff with similar instructions; and on the 18th of January, 1890, a third writ of *fieri facias* sued out by one *Hales*, for £374 14*s.* 8*d.*, was lodged with the sheriff, with instructions to take the money received from the public at the doors of the theatre.

The sheriff's officer proceeded to receive the money at the doors, and continued to do so from the evening of the 18th of January, down to and including the 27th of January. During this period he received £1495 5*s.* 6*d.* in all.

On the 18th of January, 1890, a petition for the winding-up of the company was presented by *Alias*, and on the 24th of the same month an order was made by Mr. Justice *Kay*, appointing *H. Pannell* provisional official liquidator of the company, with power to act forthwith, but without prejudice to the rights of the sheriff, the powers of such liquidator being restricted to paying the artistes employed by the company, and, after the claims of the sheriff were satisfied, carrying on the company's business.

On the 24th of January, 1890, the sheriff's officer paid or retained the following sums: £681 1*s.* 6*d.*, for levy, writ, interest, fees, poundage and possession-money, in respect of the claim of *Alias*; £49 14*s.* 9*d.*, for levy, writ, interest, fees, and poundage, in respect of the claim of *Calderwood*; and £481 6*s.* 1*d.*, for levy, writ, interest, fees, poundage, and possession money, in respect of the claim of *Hales*, and he also paid £20 to Mr. *Pannell*. After retaining his own costs, the sheriff had in his hands a balance of £594 9*s.* 2*d.*

On the 24th and 25th of January, 1890, letters were sent by *Pannell* and his solicitor, informing the sheriff of the

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appointment of *Pannell* as provisional liquidator, claiming the money received at the theatre since the presentation of the petition, giving the sheriff notice not to part with it, and stating that he would be held personally responsible. On the 25th of January, 1890, the sheriff's officers wrote in reply, stating that the greater part of the money received had been paid to the execution creditors, and that they would hold the balance pending any application to the Court. On the 27th of January, they wrote stating that they had now received sufficient money to pay out all executions in their hands prior to Mr. *Pannell's* appointment, and had withdrawn all their men from possession, with the exception of one who held under a fourth writ for £533, lodged on the 27th of January, and who had been instructed not to interfere with the takings.

On the 31st of January, 1890, the theatre was closed.

On the 1st of February, 1890, an order was made for the winding-up of the company, and Mr. *F. Whinney* was appointed provisional official liquidator in the place of Mr. *Pannell.* On the same day, notice of such appointment was given to the sheriff.

On the 4th of February, 1890, *Whinney's* solicitor gave notice to the sheriff not to part with the moneys received under the executions, and claimed such moneys on behalf of the company.

On the 8th of February, while the sheriff was still in possession under the writ lodged on the 27th of January, Mr. Justice *Kay*, made an order on the sheriff to withdraw as regarded any judgment or execution obtained since the presentation of the petition, and on the 10th of February the sheriff withdrew from possession, without having sold any of the goods seized.

On the 13th of May, 1890, on the application of Mr. *Whinney*, who had been appointed official liquidator, an order was made by Mr. Justice *North*, directing the sheriff to pay to *Whinney*, £1475 5*s.* 6*d.*, being the balance of the £1495 5*s.* 6*d.*, less the £20 paid to *Pannell* as above stated; but the order was to be without prejudice to any question as to the proceeds of sale of chattels actually seized by the sheriff before the commencement of the winding-up.

On the 17th of December, 1890, the sheriff, having paid the £1475 5*s.* 6*d.* as directed by the order of Mr. Justice *North*, took

out the present summons, asking that the liquidator might be ordered to pay to the sheriff out of moneys received by the liquidator for the sale of the goods seized by the sheriff under the writs lodged with him on the 16th and 17th of January, 1890, the sums of £681 1*s.* 6*d.*, and £49 14*s.* 9*d.* due for levy and charges on the said writs respectively, and the costs of the application.

From the evidence in support of the application, it appeared that the value of the goods seized by the sheriff greatly exceeded £1475, and that the proceeds of sale received by the liquidator exceeded the amount claimed by the summons.

Warmington, Q.C., and *Vernon Smith*, for the Applicant:—

The sheriff in this case merely seeks to be put back, as far as may be, in the same position as when the winding-up petition was presented, and to be relieved from the consequences of a mistake innocently made, and of which the Court will not, it is submitted, allow its officer to take advantage. If the sheriff had not taken the moneys which he has been ordered to refund, he must have realized the chattels which he seized, and, had he done so, the business of the theatre would have been stopped. *Ex parte James* (1) and *Ex parte Simmonds* (2) are clear authorities to shew that in such a case the Court will compel its officer to do that which an honest, or, as was said by Lord *Esher*, M.R., in *Ex parte Simmonds*, "a high-minded," man would in the like circumstances do, and will order him to make restitution according to the rules of honesty and fair dealing. This principle was followed and carried further by Mr. Justice *Kay* in *In re Brown* (3).

[They referred also to *In re Withernsea Brickworks* (4).]

Marten, Q.C., and *Manby*, for the liquidator:—

There has been no mistake in this case against which the Court can grant relief. There is no ground for the suggestion that the action of the sheriff was advantageous to the company; his wrongful seizure of the takings at the doors was the very thing which necessitated the closing of the theatre. There can be no

(1) Law Rep. 9 Ch. 609.
(2) 16 Q. B. D. 308.
(3) 32 Ch. D. 597.
(4) 16 Ch. D. 337.

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equity on the part of the sheriff. His rights are legal, and he acts at his own peril: *Glasspoole* v. *Young* (1). The goods seized by him are in the custody of the law: *Union Bank of London* v. *Lenanton* (2). If he had seized the chattels and withdrawn before the presentation of the petition, he could not have seized them again. The mistake, if any, on the part of the sheriff was not induced by any act of the Court or the liquidator, as officer of the Court, and the cases of *Ex parte James* (3) and *Ex parte Simmonds* (4) have no application. *Ex parte James* turned entirely on the fact that the trustee in bankruptcy, the officer of the Court, had made an improper claim, and received money paid under a mistake thereby induced. That decision was based on a personal equity which attached to the conscience of the officer of the Court, and to which the Court felt bound to give effect. In the present case there has been no payment under mistake to any officer of the Court. So in *Ex parte Simmonds* the mistake was treated as that of the Court. Here there has been no such mistake. The mistake, if any, was that of the sheriff only.

The Court will not grant relief in such a case where there is no equity affecting the conscience of the person against whom the relief is sought: *Rogers* v. *Ingham* (5). Even if an equity could be shewn, the Court, it is submitted, would not give effect to it, as the parties cannot be replaced in their original positions. The theatre might have been carried on with success if the sheriff had not seized the takings.

[They referred also to *In re Evans* (6).]

E. Beaumont, for the debenture-holders:—

Whatever may be the case as regards the general creditors, the relief now sought ought not to be granted as against the debenture-holders. If the sheriff were now in possession of these chattels, and the case were being tried on interpleader, the debenture-holders would have a better right than the execution creditors. The only transactions which can hold good as against debenture-holders having a floating security are such as are done in the

(1) 9 B. & C. 696.
(2) 47 L. J. (Q. B.) 409, 412.
(3) Law Rep. 9 Ch. 609.
(4) 16 Q. B. D. 308.
(5) 3 Ch. D. 351.
(6) 34 Ch. D. 597.

ordinary course of the company's business with the sanction of the directors: *Hubbuck* v. *Helms* (1); *Taylor* v. *M'Keand* (2). The directors did not put the sheriff in; he seized *in invitos* as regards them.

Moreover, the code of ethics which affects the Court and the liquidator cannot bind the debenture-holders. They are not bound to put the sheriff back, because he chose, like the dog in the fable, to drop the goods and seize the money. The liquidator does not represent the debenture-holders, who might have obtained their own receiver independently of the liquidation: *Conveyancing and Law of Property Act*, 1881, ss. 2, sub-s. vi.; 19.

[He referred also to *In re Panama, New Zealand, and Australian Royal Mail Company* (3); *In re Florence Land and Public Works Company* (4); *In re Colonial Trusts Corporation* (5); *Wheatley* v. *Silkstone and Haigh Moor Coal Company* (6).]

KEKEWICH, J.:—

The cases cited on behalf of the Applicant, if I understand them aright, establish a principle, and it seems to me that that principle is applicable to the case in hand. I need only refer to two of the cases, both before the Court of Appeal: *Ex parte James* (7) and *Ex parte Simmonds* (8). In the first of these cases the execution creditor was entitled to the money which, under the impression that he was not so entitled, he had handed over to the trustee in bankruptcy. The trustee in bankruptcy had made a mistake of law in insisting on his title to the money, and the execution creditor had made a mistake of law in admitting that title, and the Lords Justices—Lord Justice *James* giving judgment on this one point, the Lord Justice *Mellish* concurring—ordered the trustee in bankruptcy to restore the money to the execution creditor, who ought never to have parted with it. The Lord Justice *James*' judgment on this point is to be found on p. 614. He notices the rule that, as

(1) 56 L. J. (Ch.) 536; 56 L. T. (N.S.) 232.
(2) 5 C. P. D. 358.
(3) Law Rep. 5 Ch. 318.
(4) 10 Ch. D. 530.
(5) 15 Ch. D. 465.
(6) 29 Ch. D. 715.
(7) Law Rep. 9 Ch. 609.
(8) 16 Q. B. D. 308.

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between ordinary litigants, there is no rectification of a mistake in law—that money paid under a mistake in law cannot be recovered. Then he says that that must not be pressed too far, and that there are several cases in which the Court of Chancery has held itself not bound strictly by it; and then he adds to these cases, as I understand his judgment, that in which an officer of the Court is the defendant or respondent, or other person from whom the money is sought to be recovered, and he notices that the officer of the Court has money in his hands in trust for its equitable distribution among the creditors. Having said that, he proceeds as follows: "The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it." If I follow the Lord Justice's mind correctly, he is still dwelling upon the several cases which he refers to in general terms, but which he does not particularize, in which it was held that the Court of Chancery was not strictly bound by the rule which he had mentioned; yet, when he speaks of equitable distribution among creditors, I cannot help thinking he passes, to some extent at least, into another view of equity—that of the outside world, rather than that which prevails within these walls; and I think it at least possible that, when he uses the expression, "which in equity belongs to some one else," he is again speaking of that broader equity rather than of the technical equity which we administer, because he goes on to say: "In my opinion the Court of Bankruptcy ought to be as honest as other people." We do not discuss matters of claim between plaintiff and defendant as questions of honesty, though the honesty of a case is frequently an important consideration. But whether plaintiff or defendant is right or wrong is not affected by right in honesty, but by right in law, using law as comprehending, of course, equity; and I think that the Lord Justice *James*—reading his words alone, without reference to the interpretation of any one else—was pointing to some rule outside that of technical equity. Still, if that case had stood alone, there is no doubt a difficulty occasioned by the language used, and by the circumstances of that case, where the money certainly had been paid, as I have already mentioned, by the execution creditor

merely under a mistake of law, and the cases to which the Lord Justice *James* referred might have been held to be applicable to it. But in the case of *Ex parte Simmonds* (1), in dealing with a different case, the Master of the Rolls, if I may venture to use the expression, waxed bolder, and taking the Lord Justice *James'* judgment, and especially the last words, he enlarges on them, and gives them a force which, standing alone, it might have been difficult to attribute to them; and what he says in effect at p. 312 is this, that it is not a question of equity, it is not a question of law, but it is a question of honesty; and although we are obliged sometimes to give to a man that to which he is in law entitled, though we think he really is not, or to withhold from a man that to which he is not in law entitled, though we think he really is, yet no one has ever suggested that taking advantage of these technical rules is high-minded, and sometimes it is exceedingly shabby, and when the Court comes to deal with an officer of its own, it will do that which it cannot make an ordinary litigant do—that is to say, avoid doing the shabby thing, and do what is really honest. I do not understand that the Master of the Rolls suggested a question of casuistry, or that a mere sentimental honesty is to prevail, nor that we are to examine delicate questions of ethics, because he uses more than once the phrase "high-minded." Where a man of ordinary honesty, intending to do his duty, is in possession of money of which he would not have been in possession if some one else had not made a mistake—made an erroneous payment or taken a wrong step in honest error—then, as a high-minded man, he sets the matter right, notwithstanding that, if proceedings had been taken in a Court of law, he would have been held to be rightly in possession. That is what I understand the Master of the Rolls to mean, and the two Lords Justices who sat with him I understand as entirely concurring, though they added in substance that which is of some importance, but perhaps will be better noticed by me later on.

I wish to state what I consider to be the principle of the two cases, in order that, if I am wrong, the matter may be properly examined. The Lord Justice *Cotton*, at the bottom of p. 313,

(1) 16 Q. B. D. 308.

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refers to *Ex parte James* (1), and says that it "lays down this proposition, that when the officer of the Court has in his hands a sum of money which has been paid to him erroneously under a mistake of law, the ordinary rule as between adverse litigants does not apply, but he will be ordered to repay it"; and that I apprehend to be a correct statement of what Lord Justice *James* says; but I do not think that the Lord Justice *Cotton* meant that that is the whole of what the Lord Justice *James* intended; nor do I think it is the whole, and it is certainly not to my mind the whole of what the Master of the Rolls intended. The principle which I think is to be deduced from the cases is this: if the assets in the hands of an officer of the Court, on behalf of creditors or others, have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognize the rules of honesty as between man and man, and to act accordingly. Apply that to the present case. The sheriff entered into possession on behalf of execution creditors—two at first, and afterwards of a third. The sheriff might have seized—it was his duty to seize—such goods as fell properly within the writs of *fi. fa.* which had been lodged with him. Instead of that he did seize the money in the till, which money was not liable to seizure, because of the presentation of the winding-up petition, which, of course, made the seizure as from that date bad. But he did take the money, and he did not take the goods; or, if he had legal possession of the goods, he gave it up. Having got the money, he paid the execution creditors; he paid, of course, also his own costs, and there was a balance over, out of which he paid £20 to the provisional liquidator who represented the company, the same person—not the same individual man, but the same person to all intents and purposes—for whom Mr. *Marten* now appears. The provisional liquidator of course knew, or must be taken to have known, whence that £20 came. He knew it was part of this money, and if he had told the sheriff then that he had no right to the money, that it was not money out of which the execution creditors could

(1) Law Rep. 9 Ch. 609.

have been paid, and that he ought not to have seized it, I cannot doubt that, somehow or other, the sheriff would have still been able to take steps to seize the goods, or otherwise set the matter right. I am not in a position to determine whether the sheriff had abandoned possession, or, if so, whether he could have retaken possession; but I apprehend that, somehow or other, the matter might have been set right, and that the sheriff would have been able to get back the money which he had paid; at any rate he would have had an opportunity of trying to do so. If he could not, he might have suffered for what he had inadvertently done. It may be that the mistake would have been irreparable; but he would, at least, have had that chance, instead of abandoning, as he did, all intention of taking possession of the goods. As it was, he paid the amounts of their debts to the execution creditors, and the provisional liquidator got a balance of £20. That was the transaction. The official liquidator found that this money had been taken in error, and he claimed to have it paid over by the sheriff. The sheriff was in point of law possessor of the money, though, as a matter of fact, he had paid it to the execution creditors, and the order was made. I confess I do not understand why the point now before me was not threshed out on that application, but the Court frequently finds difficulty in determining questions not strictly before it, and parties are not always prepared with evidence or arguments, and that circumstance, therefore, does not weigh with me much, especially as the order strictly preserves the right of the sheriff as against the property of the company, which must be taken to mean that it preserves the sheriff's right to argue the point now before me. The argument on behalf of the company has proceeded to some extent on the hypothesis that the omission to take this point before Mr. Justice *North* was the mistake. I do not so understand the case. There was no mistake there. It is not suggested that the order of Mr. Justice *North* was otherwise than perfectly right, and I could not hear the suggestion that it was not, even if I could not follow the mode in which the order was made. The mistake was at an earlier period altogether. The mistake was in the payment I have mentioned out of the money in the till seized by the sheriff and assented to at the time by the

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provisional official liquidator, so that the sheriff was prevented from going back from it there and then. What is the result? To my mind it is as clear as possible. The creditors have got the money in the till, and the creditors have got the goods into the bargain. It is idle to inquire into chances, to speculate what would have happened to the Opera House if the sheriff had done something different. How can we tell that it would have been more beneficial for him to seize the one property than the other? No one has suggested that the sheriff did not act honestly, or that the provisional liquidator did not do what was right or proper in receiving the £20. It is useless to go into these questions. But the creditors' assets have been increased, and that is the point in the judgments of the Lord Justice *Cotton* and the Lord Justice *Lindley*, to which I referred just now as coming in more appropriately in the later part of my judgment. They noticed this, and it goes to the root of the question of honesty. The creditors and debenture-holders represented by Mr. *Marten* and Mr. *Beaumont* come here, and say that, the sheriff having made a mistake, they claim to have the benefit of that mistake, and to be paid what is due to them, not only out of the money in the till, which he ought not to have taken, but out of the goods, which he ought to have taken. That seems to me to strike exactly at the question of honesty to which the Lord Justice *James* referred.

Then there are two matters of detail with which I must deal. It is said that the sheriff has gone out of possession: the execution creditors will not suffer because they have been paid, and the sheriff is liable according to well-known principles for not having discharged his duty. I confess it strikes me that it is no more honest to retain the money as against the sheriff than as against the execution creditors. When it is said that the sheriff by his officers acted honestly throughout, I should have thought that a high-minded man might perhaps have disregarded the execution creditors as being in the same boat as the other creditors, but have thought that the sheriff, who had paid, was surely entitled to some measure of sympathy from an honest man. Having dealt with the creditors generally, I come to Mr. *Beaumont's* argument about the debenture-holders. He has cited

many cases on the history of floating debentures, which I think have not much to do with the present case. I assume that the debenture-holders have a charge over all this property, that they might have had a receiver of their own, under the *Conveyancing Act* or otherwise; but whether they could or not is immaterial. If they had had their own receiver, the Court in the winding-up would have had no control over him; if, on the other hand, he had been an officer of the Court, the Court would have had the same control over him as over the official liquidator. As a matter of fact they have not got a receiver, but have trusted, and, no doubt, properly trusted, to the official liquidator. The official liquidator really represents them, and they are in no better position than the ordinary creditors, notwithstanding they have a security, and that security is a floating one. If I am right in the way in which I construe the cases and the principle established by them, it is because the man is an officer of the Court that I can make him do what to my mind is honest, and not because there is any difference between debenture-holders and ordinary creditors, nor can I make any distinction. I think, therefore, the Applicant is entitled to the order he asks.

Solicitors: *Lewis & Lewis; Boxall & Boxall; Fladgates.*

C. C. M. D.

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Feb. 9, 10, 11, 12, 13.

In re FUENTE'S TRADE-MARKS.

[1888 F. 969.]

[1888 F. 1550.]

Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 74, *sub-s.* 1 —*Old Mark—Original Fraudulent User—Refusal of Registration.*

A cigar merchant applied to register as new marks certain labels to be applied to tobacco, whether manufactured or unmanufactured.

Previous to the year 1887 he had used the marks on boxes of cigars in combination with the word "*Habana,*" though the cigars were in fact of Mexican growth and manufacture. The labels also contained words implying that he was the successor in business of a certain firm of *M. & Co.,* which he was not. The marks for the registration of which application was now made, omitted the word "*Habana,*" and, substituting the true place of origin of his cigars, had his own name on the boxes, without any false addition as to previous businesses:—

Held, that the original fraudulent user of the marks disentitled the Applicant to have them registered as new marks, even though the dishonest portions were omitted, for to permit registration would in effect be enabling the Applicant to benefit by his former fraudulent conduct.

THIS was a summons originally taken out by *José Fuente,* and revived by his representatives (he having died while the proceedings were pending), in the matter of the *Patents, Designs, and Trade Marks Act,* 1883, citing *Lionel* and *Herbert Pinto,* that the Comptroller-General might be directed to proceed with the application of *José Fuente,* notwithstanding the opposition of *Lionel* and *Herbert Pinto.* The application was made on the 10th of September, 1887, to register two trade-marks, called "*La Republica Francesa de la Union*" trade-mark, and the "*Plantacion de la Union*" trade-mark, in respect of tobacco, whether manufactured or not. There was also an application to register another mark called "*La Union,*" as an old trade-mark, but this part of the case does not call for a report.

The "*La Republica Francesa de la Union*" mark, No. 67,419, consisted of three labels.

The first label had two seated female figures, lightly clad, holding between them a medallion containing a laureated head. Over the label were in large type the words "*La Republica Francesa*" in one line, and below were the words "*De la Union,*" in

smaller type; and then in another line "*Fabrica de Tabacos Superiores,*" in still smaller type. Below the medallion were the words "*De J. Fuente, Vera Cruz.*" The second label was an oval, and contained the words "*Vera Cruz,*" with a facsimile of *J. Fuente's* name written across them. The third label was similar to the first, but of smaller size. The Applicant described himself in the application to register as successor to *Madraz y Ca., Sucesores, Vera Cruz, Mexico,* and the description of goods to which he proposed to apply the trade-mark in question was "Tobacco whether manufactured or unmanufactured."

The "*Plantacion de la Union*" trade-mark, which was numbered 67,418, also consisted of three labels. The first represented a plantation, over which were the words "*Plantacion de la Union, Fabrica de Tabacos Superiores,*" and below, the words "*De J. Fuente, Vera Cruz.*" The second label was a smaller reproduction of the one just described, while the third one was similar to the third one in the other application, and consisted of an oval with the words "*Vera Cruz,*" and *J. Fuente's* name written across them. The Applicant described himself in the same way as in the other application, and the trade-mark was to be applied to the same description of goods.

The evidence shewed that for some years previous to 1887 these marks had been used by the Applicant, except that, instead of his own name appearing on them, the labels contained the name of his predecessors "*Madraz y Ca., Sucesores,*" with the address "*Habana,*" as part of the label. Neither the Applicant, nor the firm of *Madraz y Ca.*, had ever had any factory or place of business at *Havana,* and their cigars were in fact made at *Vera Cruz,* in *Mexico.* Shortly before, or immediately after the passing of the *Merchandise Marks Act,* 1887 (50 & 51 Vict. c. 28), the Applicant discontinued the use of the name of *Madraz y Ca.*, and the address "*Habana,*" and substituted his own name "*De J. Fuente,*" and his true address "*Vera Cruz.*"

The grounds of opposition by *Lionel* and *Herbert Pinto* to both the applications, contained amongst others the following objections: "That the Applicant has used the word '*Habana*' in conjunction with the said trade-mark in such a way as to amount to or convey a misrepresentation. That the Applicant has used, in

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conjunction with the said trade-mark, a statement conveying or intending to convey to the public the impression that he is the successor in business of the firm of *Madraz y Ca.*, whereas, in fact, he is not such successor."

The grounds of opposition to the "*Plantacion de la Union*" trade-mark, also contained the following objection :—

"The Applicant has never used the said trade-mark in the way in which he proposes to register the same; the word '*Vera Cruz*,' on the trade-mark, has been substituted for the word '*Habana*,' which has been used on a trade-mark, so as to amount to or convey a misrepresentation."

Neville, Q.C., and *F. B. Muir*, for the Applicant:—

The word "*Habana*" has not been used since 1884, and its use, correct or otherwise, ought not now to be allowed to stand in the way of an honest application to register. The case of *Newman* v. *Pinto* (1) is a decision that where the whole circumstances shew fraud, the Court will not assist an applicant; but here is nothing of that sort, as the cigars were well known to be of Mexican origin.

There is nothing in our present mark which cannot be registered; and there is nothing in it, common, *i.e.* open to the trade, as defined in the case of *In re Burland's Trade-mark* (2) where "common to the trade" is shewn to mean anything the trade can legitimately use.

Aston, Q.C., *John Cutler*, and *R. A. McCall*, for the Respondents:—

There has been a fraudulent user of the same mark with a slight difference previously to this application. The Applicant cannot now be allowed by omitting the fraudulent part to benefit by the former user. The case is an instance where the rule should be applied, that he who comes to this Court must come with clean hands.

Neville, in reply:—

It is solely a question, whether the personal disability created

(1) W. N. (1887) p. 119. (2) 42 Ch. D. 274.

by the former fraudulent user is to be allowed to vitiate an honest application after that user has been discontinued. It would be unjust to say that once tainted, this mark is always tainted.

ROMER, J.:—

There are three applications before me. [His Lordship then first dealt with the mark that does not call for a report, and continued:—] That leaves the Court to consider the application, so far as concerns two new marks, No. 67,419 and No. 67,418. Those two marks may be dealt with together for, substantially, the points arising with regard to them are the same, and I will therefore confine my observations to the trade-mark 67,418, which has been referred to as the "*Plantacion*" trade-mark.

The first contention of the Respondents to this application with regard to that trade-mark is this: It is said that the application should be refused because of the facts that I am about to refer to.

That mark, though new in the sense of not having been used prior to 1875, has, in fact, been used for several years prior to the application; and attention is called to the way in which that mark has been used. The mark as used, instead of having the words *De J. Fuente,* being the name of the Applicant, and the address "*Vera Cruz,*" which is now the place of his residence or manufactory, contained the name of the predecessors in title of *Fuente,* namely, "*Madraz y Ca. Sucesores,*" with the address, "*Habana,*" and stamped upon the boxes which contained the cigars coming from this factory were the words "*Plantacion de la Union,*" and underneath, but as part of the stamp, the word "*Habana,*" and between the two words appeared the initials of the applicant's predecessors, *Madraz & Company.* The box also contained a smaller label with the word "*Habana,*" printed on it, and the initials of *Madraz & Company,* written across it. It appears that in the form which I have mentioned, the mark which it is now sought to have registered has been used for several years, and in no other form. But it further appears, that at, or about, the year 1887, or the coming into operation of the *Merchandise Marks Act,* of 1887, that the Applicant discontinued, in using

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the mark, the word "*Habana*," and used instead his own name with the address of *Vera Cruz*, in *Mexico*. It also appears that there was an application made by *J. Fuente* to register the trade-mark, as used in the form which gave the name of his predecessors in title as the owners of the mark, with the address of "*Habana*," as the place of residence. That application was not proceeded with, and in lieu of it, the application now before me was made, and made as far back as the 10th of September, 1887.

With regard to the contention on the part of the Applicant that, since 1887, or even since 1885, he has not used the label with the word "*Habana*" upon it at all, I find no evidence before me that any box of his cigars with any label of his which does not contain the word "*Habana*" upon it has ever been seen in this country, though *J. Fuente*, in his affidavit, makes a general statement as to his not having used the label in its old form since that time; but, owing to his death, the Respondents have had no opportunity of cross-examining him upon that. So far, however, as I can gather from the evidence, whatever may have been the intention of *J. Fuente*, or even his practice in *Vera Cruz*, it does not appear that he has sent any cigar-boxes over to this country having upon them a label in the form in which it is now sought to have that label registered.

Under these circumstances, the Respondents say that the application should be refused, because, as they allege, of the fraudulent user by the Applicant and his predecessors of substantially this very mark.

The first question which arises in this: Was the mark as used fraudulent? I have come to the conclusion that it was. Looking at the label as used, as appears from the exhibit before the Court, it is clear to me that the representation there made is that *Madraz & Company*, who were the predecessors of *Fuente*, had their place of business at *Havannah*. But it does not rest there. The mark on the box itself, which is burnt, and to which I before referred, also supports the view that the representation is being made that the words "*Plantacion de la Union*" were being used with reference to cigars coming from "*Habana*." And that is also further supported by the small label, to which I have referred, having the word "*Habana*" upon it, and the name of

"*J. Fuente's* predecessors in title" written across it. I come to the conclusion, therefore, that the trade-mark which it is now sought to register, was in fact used (with certain words upon it in the place of the words "*Fuente, of Vera Cruz*") fraudulently for several years, and used up to the time when the application was made for registration of this mark.

Under these circumstances, I have to consider whether the Applicant is entitled to get this mark registered as a new mark. On the whole, I think he is not so entitled. It is clear, and, indeed, was rightly admitted by Applicant's counsel, that the object of this application for registering this mark as a new mark is, in effect, to enable the Applicant to get the benefit of the old user—that is to say, the old user, which I have held to be a fraudulent user.

That, it appears to me, ought not to be allowed; because if this mark was registered, it would give the Applicant, in effect, the benefit (a benefit to which he is not entitled) of the old fraudulent user. Further, I think that the effect of the registration in this case might well be to deceive. I think any person who had been accustomed to deal with the cigars under the old form of the label, and who had been led to believe that the cigars came from *Havannah*, might still buy cigars under the new form of the label, believing that they also were *Havannah* cigars, for he would, not unnaturally, remember the old label, which he would find substantially the same as the new one, and either might not notice or might not appreciate the difference between the two arising from the substitution of the words "*Fuente*" and "*Vera Cruz*," for the words, "*Madraz & Company, Sucesores, Habana.*" The point might be put in another way. Suppose the case had come before the Court as follows: Application by Mr. *Fuente* to register the mark as a new one, saying nothing whatever about prior user. Answer put in on behalf of the opponents: "This is not a new mark; it is substantially an old mark which has long been used and known in the market." That would be an answer to the claim, but for the reply which the Applicant would ask the Court to allow him to establish, to this effect: "It was I who used the label and the trade-mark referred to, and I used it, not for *Habana* cigars, but for Mexicans; and I ask the Court

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to allow me to shew for my own benefit on this application, and in support of this application, that my old user was fraudulent; and, therefore, ought to be removed from my path." In my judgment, he ought not to be allowed to do this in order to assist him in getting this mark registered. As I have already said, the substance of the application is, that the Applicant, by registering this as a new mark, may get the benefit of his old fraudulent user. The point is a new one, and I will not be the first Judge to assist the Applicant in such a case. In my judgment, therefore, all three applications fail; but with regard to the costs, I feel bound, having had the whole of the evidence before me, to express my strong disapprobation of the evidence given by Mr. *Pinto*, and of his conduct in reference to these marks; and, therefore, I dismiss them without costs.

Solicitor for Applicant: *S. Chapman.*
Solicitor for Respondents: *J. Curtis.*

H. L. F.

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March 6, 7, 9, 23.

BARKER *v.* FURLONG.

[1889 B. 5,156.]

Conversion of Chattels—Title of Plaintiffs to sue—Auctioneers, Liability of—Evidence—Practice.

The possession of chattels by a *cestui que trust* in accordance with the provisions of the trust instrument is in law the possession of the trustees, who can maintain an action against a wrongdoer for the conversion of the chattels, and the Defendant cannot set up as an answer the title of a third person who has not asserted, or who waives, his claim to the chattels.

If a broker or auctioneer only settles the price as between vendor and purchaser of goods, and takes his commission, he is not liable as for conversion if the vendor is not entitled to sell. But where an auctioneer receives goods into his custody, and on selling them hands them over to the purchaser with a view to passing the property in them, he is to be treated as having converted the goods, and is liable to an action accordingly, his case differing from that of a packing agent or carrier in that they merely purport to change the position of the goods and not the property in them.

After the Defendants' case had been closed, an application by the

Plaintiffs' counsel for leave to call as his witness a defendant whom he had expected to be called in support of his (the Defendant's) own case refused, Plaintiffs' counsel admitting that he had not been misled by any representation to the effect that the defendant would be called.

THE Plaintiff *Barker* was the sole executor, and he and the co-Plaintiff *Baxter* were the trustees, of the will of Mrs. *Shalless*, dated the 17th of August, 1888, and by this action they claimed that the Defendants were jointly and severally liable to account for and make good the value of certain furniture which had been bequeathed by the will, and which the Plaintiffs alleged had been wrongfully converted.

Mrs. *Shalless* was, immediately before her marriage with the Defendant, *Arthur Shalless*, entitled to certain furniture. On her marriage, which took place on the 2nd of November, 1876, a settlement was executed by which the furniture was assigned to trustees upon trust immediately after the marriage to sell the furniture at the discretion of the trustees and invest the proceeds, and to hold the same upon such trusts and to and for such ends, intents, and purposes, and in such manner and form in all respects, as Mrs. *Shalless* should, notwithstanding her coverture, by any deed, will, or testamentary writing appoint, and, subject to her appointment, upon certain trusts over. The settlement also contained a proviso that, notwithstanding the trust for sale, the trustees should not sell the furniture so long as Mrs. *Shalless* was willing and able to retain the actual possession and personal enjoyment of the same without her consent in writing, and that in the meantime the trustees should stand possessed of the furniture, or such parts as should still be unsold, in trust for such person or persons, and in such manner as Mrs. *Shalless* should, notwithstanding coverture, by any writing with the consent of the trustee or trustees, such consent to be in writing, from time to time or at any time appoint, and, subject to any such appointment, upon trust to permit it to be used by Mrs. *Shalless* during her life, for her separate use without power of anticipation.

From and after the marriage, until her death on the 8th of October, 1888, Mrs. *Shalless* remained in possession of the furniture, and for several years was living apart from her

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husband, he having left her. During the whole time, from the date of the settlement till the death of Mrs. *Shalless*, the trustees never intervened or made any claim to the furniture except on one occasion, when the creditors of the husband claimed it, when interpleader proceedings were taken in the name of Mrs. *Shalless* and the trustees, and the creditors abandoned the furniture.

By her will, Mrs. *Shalless* appointed the Plaintiff *Barker* executor and trustee, and he some months afterwards proved the will. Another executor and trustee had been appointed, but he never proved or acted, and in October, 1888, he disclaimed the trusts of the will. On the 31st of July, 1889, the Plaintiff *Baxter* was appointed co-trustee with *Barker* of the will. By her will Mrs. *Shalless* gave all her furniture and other household effects to her trustees upon trust to permit her husband and her infant son to have and enjoy the same during their joint lives and the life of the survivor, and after the death of the survivor she directed that the furniture and effects should fall into and form part of her residuary personal estate. She was also entitled to a freehold house, in which the furniture was, and in which she lived, and which she was able to pass by her will, and by her will she devised her real and residuary personal estate to her trustees upon trust to sell, pay funeral and testamentary expenses and debts, and invest the residue and hold the investments in trust to pay certain legacies, and, subject thereto, in trust to pay the income to her husband until her son should attain twenty-one, he maintaining and educating thereout her said son, and, as soon as her son had attained twenty-one, upon trust to pay him a legacy, and, subject thereto, to pay the income to her husband for life, with certain subsequent trusts.

Immediately on her death the Plaintiff *Barker* went to the house and saw the furniture and had an inventory taken. He also told the servant, who had been in the service of Mrs. *Shalless* some time previously to and up to her death, that he was executor, and directed her to look after the furniture, as it was to be held in trust. The servant stopped a month after the death of Mrs. *Shalless*, and was paid by the executor a quarter's

salary, representing two months before and one month after the death of Mrs. *Shalless*. The receipt for the quarter's wages was given by her to the executor as for money due to her from the estate of Mrs. *Shalless*. *Barker* did not know of the settlement till some time afterwards, and he, as executor and trustee, permitted *Arthur Shalless* to live in the house where the furniture was as beneficiary under the will, and as beneficiary to have the user of the furniture. The servant referred to waited on him during the month, but, as Mr. *Barker* said in his evidence, her duty was also to look after the house and furniture. On or about the 25th of September, 1889, *Arthur Shalless*, without the Plaintiff's knowledge or consent, removed part of the furniture and sent it to *London*, whence it was sent to the sale-room of the auctioneers, *Furlong & Son*, at *Woolwich*, who then sold part of it for £121 6*s*. 6*d*. net, which they paid to *Arthur Shalless*, and handed the furniture over to the purchaser, and the remainder was sent by them to *Arthur Shalless*, who appropriated it to his own use.

Barker and his co-trustee accordingly brought this action against *A. Shalless*, his brother *Henry Shalless*, and the auctioneers, claiming as against *A. Shalless* the full value of the furniture, and as against the auctioneers and *Henry Shalless* the sum of £121 6*s*. 6*d*.

The trustees of the settlement had never interfered or made any claim to the furniture, and after the commencement of the action disclaimed all interest in the furniture.

A. Shalless put in a defence, but did not appear on the hearing.

The Defendant, *Henry Shalless*, denied that the property belonged to the testatrix, and that the sale was wrongful. His Lordship found on the evidence that he had been actively concerned as agent for his brother in forwarding the furniture to the auctioneers; that it was under his control while being forwarded by the railway company; that letters of instructions were directed to him, care of the auctioneers, which he directed the auctioneers to open for their instructions; and that the auctioneers sold the goods, having previously consulted him as to the preparation for their sale. There was nothing, however, to shew that

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H. Shalless was cognizant of any improper proceeding on the part of *A. Shalless* in selling. His Lordship also found that the auctioneers treated *Henry Shalless* as agent for his brother, and dealt with him in reference to the sale in that capacity.

The Defendants, the auctioneers, by their defence, pleaded that the furniture belonged neither to Mrs. *Shalless* nor to the Plaintiffs, but still remained in the trustees of the settlement, or in the alternative that the Plaintiff *Barker* as executor had assented to the bequest to *Arthur Shalless*, and that *Arthur Shalless* had at the time of the alleged conversion, both in his own right and as guardian of his son, the sole possession and right to possession of the furniture; and further, that they had acted *bonâ fide* on the request of *Arthur* and *Henry Shalless*. They also claimed, if found liable, to have a right of indemnity over against *Arthur* and *H. Shalless*.

Haldane, Q.C., and *E. Ford*, for the Plaintiffs:—

The Plaintiff *Barker*, as representing Mrs. *Shalless*, who had a complete *jus disponendi* over the goods, has through the exercise of her power of appointment and the appointment of him as executor, obtained a right to receive these goods: *In re Hoskin's Trusts* (1); *Re Philbrick* (2), and this entitles the Plaintiffs to maintain this action. A lawful possession, even though the temporary occupation be in another, is sufficient, and the possibility of a right in the trustees of the settlement, which has never been asserted, does not oust the Plaintiffs' right of action: *Congreve* v. *Evetts* (3); *Wooderman* v. *Baldock* (4).

The auctioneers are clearly liable, as appears from the *dicta* of several of the Judges and Lords in *Hollins* v. *Fowler* (5). However innocently they acted, having sold by the authority of a person who had no title, they are liable to an action for conversion at the suit of the real owner: *Adamson* v. *Jarvis* (6); *McEntire* v. *Potter & Co.* (7). The case of *Turner* v. *Hockey* (8) is inconsistent with *Hollins* v. *Fowler*, and if it were undistin-

(1) 5 Ch. D. 229; 6 Ch. D. 281.
(2) 34 L. J. (Ch.) 368; 13 W. R. 570.
(3) 10 Ex. 298.
(4) 8 Taunt. 676.
(5) Law Rep. 7 H. L. 757, 787, 795.
(6) 4 Bing. 66.
(7) 22 Q. B. D. 438, 443.
(8) 56 L. J. (Q. B.) 301.

guishable from the present would be no authority; but there is a distinction, for the auctioneers in the case put by Baron *Bramwell* were treated merely as conduit-pipes, whereas here the goods were consigned to them: they took possession, and sold them, and transferred the property in them to other persons.

Then, on the facts proved, *H. Shalless*, although acting as agent for and for the benefit of his brother, is equally liable with his brother: *Stephens* v. *Elwall* (1); *Hardman* v. *Booth* (2); Pollock on Torts (3).

Neville, Q.C., and *Mulligan*, for *Furlong & Son*:—

The property in the chattels was not in the Plaintiffs at the time of the removal, and the Defendants, acting in the ordinary course of their business as auctioneers, and selling only for their principals, are not liable to an action for conversion. Had the Plaintiffs been in the actual possession of the chattels the Defendants might perhaps be unable to set up the *jus tertii*. But where constructive possession is relied on, *e.g.*, in the case of a bailee or *cestui que trust*, then the person charged with conversion may prove that the property of the goods is in a third person. The question is whether the party seeking to maintain trover has the right of possession of, as well as the property in, the goods sought to be recovered: *Bradley* v. *Copley* (4); *Armory* v. *Delamirie* (5); *Gordon* v. *Harper* (6); *Underhill* on Torts (7). The plea of not possessed in an action of trover puts in issue the rights of the plaintiff against the world: *Leake* v. *Loveday* (8). *Congreve* v. *Evetts* (9), which was decided on a case stated, and *Jeffries* v. *Great Western Railway Company* (10), are distinguishable, because in each case the plaintiff had been in possession of the goods either by himself or an agent for a considerable time prior to their removal.

Here the property was in the trustees of the settlement. There was an absolute trust for sale which may have been

(1) 4 M. & S. 259.
(2) 1 H. & C. 803; 32 L. J. (Ex.) 105.
(3) 1st Ed. p. 171.
(4) 1 C. B. 685, 696.
(5) 1 Sm. L. C. 6th Ed. p. 315.
(6) 7 T. R. 9.
(7) 5th Ed. pp. 269, 270.
(8) 12 L. J. (C.P.) 65.
(9) 10 Ex. 298.
(10) 25 L. J. (Q. B.) 107.

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suspended during the life of Mrs. *Shalless*, but is still exerciseable after her death: *In re Tweedie & Miles* (1). Her power of appointment is only over the proceeds of sale.

The auctioneers received the goods from the agent of the person who was in physical possession of the goods, and they are not guilty of conversion: *Turner* v. *Hockey* (2). And the fact that the goods came into their possession merely for the purpose of sale is not material—the packer of goods who had shipped them under the order of an employer: *Greenway* v. *Fisher* (3), has been held not to be liable.

[They cited also *Fine Art Society* v. *Union Bank of London* (4).]

Johnston Edwards, for *Henry Shalless*:—

There is no evidence to shew that this Defendant was a party to the conversion, if any. He was at most instrumental in forwarding the goods to the auctioneers for *Arthur Shalless*, who was bailee of the goods, and his case falls within the *dictum* of Mr. Justice *Blackburn* in *Hollins* v. *Fowler* (5). There is no evidence that he knew what was to be done with the goods. *Arthur Shalless* was at law a bailee for life: *Selwyn's* Nisi Prius (6), and sending the goods was not inconsistent with his enjoyment: *Fenn* v. *Bittleston* (7); *Lancashire Wagon Company* v. *Fitzhugh* (8). On the question as to the want of title in the Plaintiffs he adopted the argument of *Neville*, Q.C.

Haldane, in reply, applied for leave to call as his own witness the Defendant *Henry Shalless*, who had not been called on his own behalf; but for the reasons stated in the judgment the application was refused.

1891. March 23. ROMER, J. (after stating the facts as above set out, proceeded as follows):—

As against *A. Shalless*, who does not appear, the action is practically undefended, and there must be judgment against him

(1) 27 Ch. D. 315.
(2) 56 L. J. (Q. B.) 301.
(3) 1 Car. & P. 190.
(4) 17 Q. B. D. 705.
(5) Law Rep. 7 H. L. 767.
(6) 13 Ed. p. 1289.
(7) 7 Ex. 152; 21 L. J. (Ex.) 41.
(8) 6 H. & N. 502; 30 L. J. (Ex.) 231.

for the full value and the costs. That value was proved to exceed the sum of £228 14*s.* 11*d.*, but as that is the value stated in the statement of claim, the judgment must be limited to that. As against *Furlong & Son* and *H. Shalless*, they are sued as having converted the goods. They raise two defences: (1.) That the Plaintiffs were not at the date of the conversion in actual possession of the goods, and that they (the Defendants) are therefore at liberty to set up the *jus tertii*, and that, the true property in the goods being in the trustees of the settlement, the Plaintiffs are not entitled to sue; (2.) that they (the Defendants) never converted the goods. As to the first point—it appears to me clear that Mrs. *Shalless's* will passed the beneficial interest in these chattels, and I think the facts amount to this—that upon her death the Plaintiff *Barker*, as executor and trustee, took possession of the furniture and house, and then under the trusts of the will allowed *A. Shalless* to remain in occupation as a beneficiary under the will until he wrongfully removed the furniture. The occupation at the time the furniture was removed was by right of the possession of the Plaintiff *Barker*, or of him and his co-Plaintiff *Baxter*, who were at law entitled to the immediate right of possession. The Plaintiffs, coupled with the immediate right of possession, had a good title to the chattels as against all the world, subject only, as to their title, to a possible claim on the part of the trustees of the settlement, which claim, in fact, was never made. This, in my judgment, gave the Plaintiffs ample right to bring this action. When a *cestui que trust* is in occupation under a trust, that the trustee has an immediate right to possession in the eye of the law sufficient to enable him to bring an action for trover appears from the case of *White* v. *Morris* (1). That case decided that where goods are assigned as security for an advance of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrongdoer. The facts were shortly these: *Robinson & Storey* assigned to *White* the goods in question, to hold to *White*

(1) 11 C. B. 1015.

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upon trust to permit *Robinson & Storey*, the mortgagors, to hold the goods until payment of the money to become due under the deed should be demanded, and with power to *White* to sell in default of payment. Certain creditors of one of the mortgagors obtained judgment against him and issued execution, and seized and sold the goods, and this before any demand had been made for payment of the mortgage money. In support of the case of the creditors, *Bradley* v. *Copley* (1) was cited. But that and other cases like it are distinguished in *White* v. *Morris* (2), on the ground that the possession of the mortgagors was, by virtue of the trusts of the deed, practically, that of the mortgagee—or in other words that the mortgagee had in law an immediate right to possession. Chief Justice *Jervis* said (3) that Mr. *Hill*, the counsel, had "contended that no present possession of the goods in question passed to the plaintiff under the deed of assignment . . . sufficient to entitle him to maintain this action; and, in support of this view, he relied upon the cases of *Bradley* v. *Copley* and *Wheeler* v. *Montefiore* (4). But a comparison of the deeds in those cases with the language of the deed here, will shew that they have no application. Here, a right to the possession did pass to the plaintiff by the deed, though it was encumbered with a trust, but which trust is quite consistent with the right to the possession remaining in the plaintiff. In the cases cited, however, instead of a trust, there was a proviso to the effect, that, until default made, the assignors should have possession, and no right to the present possession passed to the assignees." And Mr. Justice *Maule* (5) says: "I am of the same opinion. As to the plaintiff's not being possessed, the distinction between this case and those relied on by Mr. *Hill* has been pointed out by the Lord Chief Justice in a manner quite satisfactory to my mind. The deed was one under which the plaintiff was bound to take possession of the goods assigned, for the purpose of enabling him to perform the trusts." The same view of the law is taken in *Wooderman* v. *Baldock* (6). And when there is a right of immediate possession

(1) 1 C. B. 685.
(2) 11 C. B. 1015.
(3) Ibid. 1028.
(4) 2 Q. B. 133.
(5) 11 C. B. 1030.
(6) 8 Taunt. 676.

coupled with a title to goods, though the title may be not perfect as against, or may even be liable to be defeated by, the claim of a third person, yet, if that third person has not intervened, a wrongdoer dealing with the chattels cannot set up the title of that third person as an answer to an action against him for his wrongdoing: see *Morgan* v. *Knight* (1). In that case a man during his first bankruptcy acquired some goods and disposed of them to his son by a fraudulent transfer, and then became again bankrupt, and the assignee in the second bankruptcy sued the son for the value of the goods. The son set up as a defence the title of the assignee in the first bankruptcy. It was held no defence as against the assignee in the second bankruptcy, as the assignee in the first bankruptcy had not intervened, and the second bankruptcy was not void.

I now pass to the second point which was argued on behalf of the Defendants; and here I must distinguish the case of *Furlong & Son*, the auctioneers, from that of *H. Shalless*. As to *Furlong & Son*, it is urged on their behalf that they have only acted as auctioneers, and that, so acting, they have not been guilty of any conversion, and they rely on the case of *Turner* v. *Hockey* (2). Now, I agree that if an auctioneer or broker does nothing more than settle the price as between a vendor and a purchaser of goods and takes his commission, he is not liable as for a conversion should it turn out that the vendor was not entitled to sell. That is the case put by Lord *Bramwell* in *Cochrane* v. *Rymill* (3), as one where the auctioneer would act merely as a conduit-pipe, and not be liable for a conversion. But where, as here, the auctioneer receives the goods into his custody, and, on selling them, hands over the goods to the purchasers with a view to passing the property in them, then I think the auctioneer has converted the goods, and is liable accordingly, and for this the case of *Cochrane* v. *Rymill* is an authority, and I may also refer to *Featherstonhaugh* v. *Johnston* (4), and *Adamson* v. *Jarvis* (5). The general rule is that where an agent takes part in transferring the property in a chattel and it turns out that his principal has

(1) 15 C. B. (N. S.) 669.
(2) 56 L. J. (Q. B.) 301.
(3) 27 W. R. 777.
(4) 8 Taunt. 237.
(5) 4 Bing. 66.

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no title, his ignorance of this fact affords him no protection. I was referred to the cases of a carrier and packing agent as supporting the case of the auctioneers. But the carrier and packing agent are generally held not to have converted, because by their acts they merely purport to change the position of the goods, and not the property in them. In the answers of the Judges and the addresses of the Lords in the case of *Hollins* v. *Fowler* (1), I find statements supporting the views above mentioned. Mr. Justice *Blackburn* says (2): "I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle one who deals with goods at the request of the person who has the actual custody of them, in the *bonâ fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody." And again he says (3): "Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner . . . And the same principle would apply to the cases alluded to by my Brother *Hannen* in his judgment in the Court below, of persons 'acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger.' . . . It was said, 'Suppose that the defendant had sent the delivery order to *Micholls*, who had handed it to the railway company, requesting them by means of it to procure the goods in *Liverpool* and carry them to *Stockport*, and the railway company had done so, would the railway company have been guilty of a conversion?' I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at *Liverpool* to one at *Stockport*, is *primâ facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway

(1) Law Rep. 7 H. L. 757. (2) Law Rep. 7 H. L. 766.
(3) Law Rep. 7 H. L. 767.

company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case." Mr. Baron *Cleasby* (1), clearly puts the exact point. "How far," he says, "the intermeddling with the goods themselves by delivering them would do so"—that is, involve any responsibility to third persons—"admits of question, and was the subject of much argument at the Bar, and might depend upon the extent to which the broker in each case could be regarded as having an independent possession of the goods, and delivering them for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable, as upon a conversion, to the real owner." Lord *Chelmsford* (2) puts the case thus: "But to my mind the proposition which fits this case is, that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." Lord *Cairns* (3) deals with the case in substantially the same way. Lord *O'Hagan* says (4): "The defendants got possession of the plaintiffs' cotton. They had it conveyed to the railway station and forwarded to the purchaser in *Stockport*, who paid for it and made yarn of it. It seems to me that this state of facts entitles the plaintiffs to recover in an action of trover, which rests on a right of property, wrongfully interfered with, at the peril of the person interfering with it, and whether the interference be for his own use or that of anybody else." With regard to *Turner* v. *Hockey* (5), it appears to me that if it is to be supported it must be on the ground that the learned Judges took the view on the facts before them that the auctioneer had done nothing but act as a mere conduit-pipe; but if the facts are rightly reported, I doubt if on those facts I should

(1) Law Rep. 7 H. L. 787.
(2) Ibid. 795.
(3) Law Rep. 7 H. L. 797.
(4) Ibid. 799.
(5) 56 L. J. (Q. B.) 301.

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personally have come to the conclusion they appear to have arrived at.

Next, with regard to the Defendant *Henry Shalless*. The Plaintiffs' counsel asked me when he rose to reply to allow him to call this Defendant as his witness, because he had assumed that this Defendant would be called as a witness on his own behalf. Although most reluctant ever to exclude evidence, I did not accede to the application for this reason. In reply to my question, the counsel admitted that in closing his case without calling the Defendant, he had not been misled by anything falling from the other side to suppose that they would call him. This being so, it appeared to me that the Plaintiffs' counsel had, in the exercise of his judgment, preferred to close his case without calling the Defendant on the chance that the Defendant would appear in the box to support his own case, when he could be cross-examined without the risk attending the calling of him as one of the Plaintiffs' witnesses; and it appeared to me that in a case like this, in granting the Plaintiffs' application after the Defendants' case had been argued and closed and a reply begun, I should be making a precedent which would, if established, lead to an improper amount of laxity in the conduct of a plaintiff's case. But though I refused this application, I fully agree with what Mr. *Haldane* said—that I am entitled and bound under the circumstances of the Defendant's not appearing to support his case, though he was in Court, to make every reasonable presumption against him; and, on this footing, having regard to the admissions made on behalf of this Defendant in the course of the trial, it appears to me that the Plaintiffs have established their case against him. From the admitted correspondence of *Henry Shalless* with *Furlong & Son*, it appears that he was actively concerned in forwarding the chattels to the auctioneers; that the goods were under his control while being forwarded by the railway company; the keys are being sent on by his directions, accompanied by letters of instructions directed to him, care of the auctioneers, which he directs the auctioneers to open for instructions. What those instructions are does not appear; but this does appear—that, following this forwarding of the chattels for the auctioneers to deal with according to instruc-

tions, they do in fact, as was previously admitted by *Henry Shalless* during the Plaintiffs' opening, receive and sell certain of the chattels; and another admitted letter to *Henry Shalless* from *Furlong & Son* shews the auctioneers still consulting him about the preparation for sale of these chattels by the auctioneers after they have received them. Under these circumstances I think *Henry Shalless* must be taken to have sent the chattels to the auctioneers for the purpose of their selling, and to have instructed the auctioneers to sell, the chattels as they did with the view of passing the property in the goods sold to the purchasers as against the true owners of the goods sold. This, in my opinion, amounted to a conversion according to the rules I have before referred to. In fact, the case of *Henry Shalless* in this matter is far stronger as a conversion than that of the agent in *Stephens* v. *Elwall* (1), which has always been recognized as a binding authority, and is referred to with approval in *Hollins* v. *Fowler* (2). Under these circumstances there must be judgment for the Plaintiffs against *Furlong & Son* and *Henry Shalless* for £121 6*s.* 6*d.*, the price of the goods sold by *Furlong & Son*, and they must pay the costs of the action as against them.

The question was then argued whether *H. Shalless* was liable to indemnify the auctioneers.

ROMER, J., said, that no promise to indemnify could be implied. *H. Shalless* warranted that he was acting by the direction of *A. Shalless*, but he had that authority. *Furlong & Son* knew that the goods were to be sold by the direction of *Arthur Shalless* given by *H. Shalless*. There was no direction by *Henry Shalless*, except on behalf of *Arthur*; and *Furlong & Son* did not act on any idea as to receiving an indemnity if any authority was exceeded. This claim of *Furlong & Son* failed, and they must pay the costs of it.

Solicitors for Plaintiffs: *McDiarmid & Teather*, agents for *J. D. & D. M. Macdonald, Newcastle-on-Tyne.*

Solicitors for Defendants: *E. W. Sampson; Edwin Shalless.*

(1) 4 M. & S. 259. (2) Law Rep. 7 H. L. 757.

A. C. E.

C. A.

1890

KEKEWICH, J.

July 22, 23, 24, 25, 26.

C. A.

Nov. 26, 27, 28, 29; *Dec.* 1, 2, 18.

In re APOLLINARIS COMPANY'S TRADE-MARKS.

Trade-mark—Registration—"Person Aggrieved"—Importer—Foreign Producer—Natural Products—"Distinctive Trade-mark"—Part of Label pointed out as "Trade-mark"—Disclaimer of Words in Label—"Fancy Words"—"Geographical Name"—Name of Mineral Spring—"Place of Business"—"Common to the Trade"—Time for Disclaimer—Trade Marks Registration Act, 1875 (38 *&* 39 *Vict. c.* 91), *ss.* 5, 10—*Patents, Designs, and Trade Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57), *s.* 90—*Amendment of Act while Application pending.*

The intention of the *Trade Marks Registration Act,* 1875, *s.* 5, and the *Patents, Designs, and Trade Marks Acts,* 1883, *s.* 90, in requiring an applicant for rectification of the register of trade-marks to be a "person aggrieved," is only to prevent the interference of common informers, or of persons actuated by merely sentimental notions, and not to require evidence of serious damage.

Any person who is in the same trade as the person who has wrongfully registered a trade-mark, and who desires to deal in goods covered by the wrongful registration, is *primâ facie* a person aggrieved.

Whenever one trader, by the wrongful registration of a trade-mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of the trade into which he desires to enter, that rival is a "person aggrieved."

Although the effect produced, or likely to be produced, by the wrongful registration is not the exclusion, but only the hampering of the rival trader, the rival trader is a "person aggrieved."

Whenever one trader uses the fact of his having a trade-mark already on the register as any part of his case against another trader in any legal proceedings, *e.g.*, for the purpose of supporting an application for the registration of another trade-mark, which the second trader is opposing, the second trader is a "person aggrieved," and none the less because he may have other means of defending himself.

A trade-mark must at the date of registration distinguish the goods of the trader registering it from all others.

An importer of foreign goods cannot register as his own the trade-mark of the foreign producer, whether the goods are produced by a course of manufacture or by a process of nature; nor whether the importer has or has not an exclusive contract for this country; nor whether the producer does or does not consent to the registration.

Whether an importer can or cannot register as his own the producer's trade-marks after the importer has acquired the control of the producer's entire output (as to which, *quære*), the registration by the importer in his own name, while only having a lesser right, of trade-marks belonging to the producer, cannot be rendered valid by the subsequent acquisition by the importer of the right to the whole output.

Although in the case of a new trade-mark it will ordinarily be presumed that a mark tendered for registration is intended to be used, yet, if it is proved that a mark which it is sought to register, without prior user, is

not intended to be used by the applicant, but that he is an importer of foreign goods and is only seeking to register the mark for the purpose of excluding from the English market similar goods intended for foreign consumption, and having the mark affixed to them by the foreign producer, whose mark it is, registration ought not to be allowed.

Where a label tendered for registration contains, with other matter, a device to which special attention is directed as being the "trade-mark," registration ought to be refused, on the ground that the effect of the label is likely to be to mislead the public into the belief that the device alone is protected or claimed.

Words contained in a distinctive label registered as a whole under the *Patents, Designs, and Trade Marks Act*, 1883, need not be disclaimed under sect. 74 of that Act, inasmuch as they form a part of the label, and are not additions to it.

Where a trade-mark has been wrongfully registered, and an application to remove it from the register is made by a person aggrieved, the mark will not be allowed to remain on the register, on the ground that if it were removed it could (by reason of some intervening events) be immediately re-registered on a new application, inasmuch as an opportunity must be given to the public, by the insertion of the usual advertisements to come in and oppose the new application.

The names of well-known mineral-water springs, such as "*Apollinaris*," "*Hunyadi Janos*," "*Friedrichshall*," are geographical and are not "fancy words not in common use" within sect. 64 of the Act of 1883, nor "invented words" or "words having no reference to the character or quality of the goods, and not being a geographical name" within the same section, as amended by the Act of 1888, whether sought to be registered in respect of the waters of the springs or of products of those waters.

Per Kekewich, J.: The names of foreign springs, when added to a trade-mark tendered for registration under the Act of 1888, by a limited company with a registered office in England, are not protected against the requirement of a disclaimer under sects. 64, 74, of that Act, by the exception contained in those sections in favour of a "place of business."

Per Kekewich, J.: Where an application for the registration of a trade-mark was made while the Act of 1883 was in force, but being opposed, was not heard until after the amending Act of 1888 had come into force, the applicants were *held* to be entitled to avail themselves of whichever of the two Acts was the more favourable to their application.

Per Kekewich, J.: "Common to the trade" in sect. 74 of the Acts of 1883–8, means "open to the trade," and not "in common use in the trade."

Per Kekewich, J.: When a disclaimer is required by sect. 64 of the Act of 1888, or by sect. 74 of the Acts of 1883–8, such disclaimer must be made in the application for registration, and cannot be made afterwards.

THE questions at issue in these cases related to a large number of trade-marks registered, or sought to be registered, by the *Apollinaris Company, Limited*, of *London*, in connection with the waters or products of the waters of three natural mineral springs, viz., the *Apollinaris* spring in *Rhenish Prussia*, the *Friedrichshall*

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spring in *Saxe Meiningen*, and the *Hunyadi Janos* spring in *Hungary*.

The particulars with reference to the trade-marks actually registered were as follows:—

No.	Class.	Goods.	Date of application.	User claimed.
2,076	44	*Apollinaris* water.	Feb. 9th, 1876.	2 years before Feb. 9th, 1876.
4,122	44	The natural mineral water, called *Apollinaris* water.	March 21st, 1876.	2 years before March 21st, 1876.
45,096	44	Natural mineral water.	May 15th, 1885.	None.
45,097	44	Mineral and aërated water, natural and artificial.	May 15th, 1885.	By applicants and predecessors in business for a period commencing at least 25 years before 1875.
48,933	44	Natural mineral water.	Nov. 17th, 1885.	None.
6,356	44	Natural mineral water.	June 2nd, 1876.	None.
6,357	44	Natural mineral water.	June 2nd, 1876.	None.
9,026	44	Bitter mineral water.	Sept. 15th, 1876.	By applicants and predecessors for 2¾ years before Sept. 11th, 1876.

The particulars with reference to the trade-marks which the *Apollinaris Company* were applying to register were as follows:—

No.	Class.	Goods.	Date of application.	User claimed.
44,218	44	Mineral and aërated waters.	April 4th, 1885.	None.
44,219	44	Mineral and aërated waters.	April 4th, 1885.	None.
44,220	44	Mineral and aërated waters.	April 4th, 1885.	None.
45,591	3	A chemical substance prepared for use in medicine and pharmacy.	June 10th, 1885.	None.
45,589	3	A chemical substance prepared for use in medicine and pharmacy.	June 11th, 1885.	None.
45,699	44	A mineral water.	June 16th, 1885.	None.
45,700	44	A mineral water.	June 16th, 1885.	None.
49,535	44	Natural mineral water.	Dec. 12th, 1885.	None.
45,590	3	A chemical substance prepared for use in medicine and pharmacy.	June 10th, 1885.	None.

Of the above trade-marks, Nos. 2076, 4122, 44,218, 44,219, 44,220, and 45,591, were connected with *Apollinaris* water and salts; Nos. 45,096, 45,097, 48,933, 45,589, 45,699, 45,700, and 49,535 with *Friedrichshall* water and salts; and Nos. 6356, 6357, 9026, and 45,590, with *Hunyadi Janos* water and salts.

Of the *Apollinaris* trade-marks, Nos. 2076 and 45,591, consisted of the word *Apollinaris* in ordinary type. No. 4122 consisted of the words "*Apollinaris Brunnen*" in a circle, and within the circle an anchor.

No. 44,218 contained the words "*Apollinaris Brunnen*," "*Apollinaris Company, Limited*," and several German words, and also the device of a triangle with the words "*Trade Mark*" immediately beneath it, and a long inscription in Malay characters, and the same trade-mark as in No. 4122, four times repeated on a small scale. In use, the triangle was coloured red. The upper part of the label was used by the former owners of the spring.

Nos. 44,219 and 44,220 were the same as 44,218, except that in No. 44,219 the centre device was a diamond, and in 44,220 it was a diamond divided into two parts by a transverse line.

Of the *Friedrichshall* trade-marks, No. 45,097 and 45,589 consisted of the word "*Friedrichshall*" in ordinary type.

No. 45,096 consisted of the words "*Friedrichshall*" mineral water, "*Sole importers, the Apollinaris Company, Limited, London*"; "*Sole proprietors, C. Oppel & Co., Friedrichshall*," and with a central device of a circular disc with the words "*Trade Mark*" immediately beneath it, and a description of the properties of the water, and testimonials as to its efficacy. When used the disc was coloured red.

No. 48,933 was a device of the letter "*F*," crossed by an arrow.

No. 45,699 consisted of a rectangular figure with the word "*Friedrichshaller*" in large type across the label, and a description of the water in the German language, and also the words "*Natürliches Friedrichshaller Bitterwasser*," "*Die Brunnendirection in Friedrichshall, C. Oppel & Co.*"

No. 45,700 was a similar trade-mark in the English language, but without the word "*Friedrichshaller*" in large type.

No. 49,535 was in the German language, and contained a

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central device of the letter "*F*" and arrow, as in No. 48,933, inclosed in a square figure, and the words "*Friedrichshall, Bitterwasser,*" in large type, and information and testimonials as to the water; also the names of the proprietors, *C. Oppel & Co.*

Of the *Hunyadi Janos* marks, Nos. 9026 and 45,590 consisted of the words "*Hunyadi Janos*" in ordinary type. No. 6356 consisted of the words, "*Hunyadi Janos Budai Keserüviz Forrás,*" "*Bittersalzquelle,*" "*Eigenthümer Andreas Saxlehner in Pest,*" with the design of a man's head.

No. 6357 was a similar trade-mark, but in the English language.

The *Compagnie Fermière de l'Établissement Thermal de Vichy* (called in the report the *Vichy Company*), which was a French company, purchased, in May, 1885, the business and goodwill of an English firm of mineral-water importers and dealers known as *Ingram & Royle.* The last-mentioned firm had been for many years in the habit of dealing in *Apollinaris, Friedrichshall,* and *Hunyadi Janos* waters. They obtained the *Friedrichshall* water direct from the spring; but they purchased the *Apollinaris* and *Hunyadi Janos* water from the *Apollinaris Company Limited,* who had made contracts for the use of the water with *Kreuzberg* and the *Actien Gesellschaft* (a German company), the proprietors of the *Apollinaris* spring, and with *Saxlehner,* the proprietor of the *Hunyadi Janos* spring. At the date of the registration of 2076 and 4122, the company had under their contract a right to demand only a limited amount of the produce of the *Apollinaris* spring. Subsequently they obtained a contract giving them a right to the whole output. In 1885 the *Apollinaris Company* obtained an exclusive contract from the proprietors of the *Friedrichshall* spring also. The *Vichy Company* were desirous of trading in the three waters as *Ingram & Royle* had done, and applied to the *Apollinaris Company* to supply them with them. The *Apollinaris Company* refused to do this or to supply any dealer who supplied the *Vichy Company.* Thereupon the *Vichy Company* opposed the pending applications of the *Apollinaris Company,* and after the usual steps had been taken in the Trade Marks Registry, six summonses were taken out by the *Apollinaris Company* and adjourned into Court, by which they asked that

the registration might proceed of (1.) marks Nos. 44,218, 44,219, and 44,220; (2.) No. 45,591; (3.) No. 45,589; (4.) Nos. 45,699 and 45,700; (5.) No. 49,535; (6.) No. 45,590.

In their affidavits in support of their applications (though not in their counter-statements) the *Apollinaris Company* relied on their trade-marks already registered, and the *Vichy Company* thereupon gave notice of motion to expunge (1.) Nos. 2076 and 4122; (2.) Nos. 45,096 and 45,097; (3.) No. 48,933; (4.) Nos. 6356, 6357, and 9026.

Voluminous affidavit evidence was filed by both sides, the substance of which, so far as material, is sufficiently stated in the judgments given below.

The motion by the *Vichy Company* to expunge the registration by the *Apollinaris Company* of their *Apollinaris* marks, Nos. 2076 and 4122, was first heard before Mr. Justice *Kekewich*.

Aston, Q.C., *Warmington*, Q.C., *Sebastian*, and *F. M. Abrahams*, for the Applicants:—

In the first place, the evidence shews that there had been no user of the word "*Apollinaris*" on goods alone, and not in combination, as a trade-mark before the 13th of August, 1875, within the requirements of *In re J. B. Palmer's Trade-mark* (1); *In re Spencer's Trade-marks* (2); *Perry Davis & Son* v. *Harbord* (3); *Thompson* v. *Montgomery* (4); and the burden imposed on the Applicants as the persons challenging the trade-mark is consequently transferred to the *Apollinaris Company*: *In re Leonard & Ellis's Trade-mark* (5).

Secondly, the word is merely descriptive of the article, meaning water from the *Apollinaris* spring, and it is not sufficient to affix the name to the article unless the Court can infer that it was so affixed not as descriptive of the article, but in order to be a trade-mark: *In re Harrison, McGregor & Co.'s Trade-marks* (6); *Re Chorlton & Dugdale's Trade-mark* (7).

Thirdly, the *Apollinaris Company* has no right established

(1) 24 Ch. D. 504.
(2) 3 Rep. Pat. Cas. 73.
(3) 15 App. Cas. 316.
(4) 41 Ch. D. 35.
(5) 26 Ch. D. 288.
(6) 42 Ch. D. 691.
(7) 53 L. T. (N.S.) 337.

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by user to register it as their property any more than any other trader who was an importer of the goods or a dealer in them.

Fourthly, the mark in question belongs to the former proprietors of the spring, and never belonged to the company, there being nothing in the contract amounting to an assignment of goodwill; but the falsity of the statements on which they obtained registration was a defect at the date of the registration, and could not be cured by any subsequent operation: *In re Wood's Trade-mark* (1); for the state of circumstances existing at the date of registration must be looked at, and at that date anybody could sell *Apollinaris* water under that name.

Fifthly, the *Apollinaris Company* are endeavouring to turn what was only a right of action under their contract into a right of property within *Richards* v. *Butcher* (2).

Rigby, Q.C., *Neville*, Q.C., and *J. Cutler*, for the *Apollinaris Company*:—

The *Vichy Company* are not "persons aggrieved" within sect. 90 of the Act of 1883. A person coming to expunge must shew either that he has suffered, or that in all reasonable probability he will suffer damage in a legal sense at the time when the application to expunge is made: *In re Rivière's Trade-mark* (3); and at that date the *Apollinaris Company* were monopolists of the spring, and could deal with it as they thought best for their own benefit, and their conduct was not illegal: *Mogul Steamship Company* v. *McGregor, Gow & Co.* (4). Although no trader could get lawful possession of a single bottle except through the *Apollinaris Company*, this was not the legal damage required. The present is not a case where one dealer in a common article has put on the register as a trade-mark a name common to the trade—the fact that they sold the water when they got it as *Apollinaris* did not make it common to the trade: *Wotherspoon* v. *Currie* (5). If they could not come here and get

(1) 32 Ch. D. 247.
(2) Before *Kay*, J., 11th June, 1890, not reported.
(3) 26 Ch. D. 48; and on subsequent hearing, 53 L. T. (N.S.) 237.
(4) 23 Q. B. D. 598.
(5) Law Rep. 5 H. L. 508.

the marks removed the character of the marks themselves was immaterial.

As they are coming under the Act of 1875, the proceedings were by sect. 113 of the Act of 1883 to be carried on as if the later Act had not passed, and under sect. 5 of the earlier Act the Court must "be satisfied of the justice of the case" before acceding to the application; and here the real applicants did not come forward till 1890, fourteen years after the registration.

Allowing that the word "*Apollinaris*" had not been used as a trade-mark prior to 1875, still under sect. 64 of the Act of 1883 the word was a "fancy word not in common use," or under sect. 10 of the Act of 1888 a word "having no reference to the character or quality of the goods, and not being a geographical name"; the word was not descriptive in the sense in which *Valvoline* (1), *Reversi* (2), *Electric Velveteen* (3), were descriptive.

Warmington, in reply:—

By reason of the registration in 1875—to which however, by their own admission at the Bar, they had no right—the right of the *Vichy Company* or its predecessors is destroyed so far as the Act of Parliament goes so long as the registration stands. It is only by expunging the registration that the *Vichy Company* can be restored to the rights which belonged to it in 1875. Persons whose rights are abridged by registration are persons aggrieved: *In re Hayward's Trade-marks* (4); *In re Ainslie & Co.'s Trade-mark* (5); *In re Batt's Trade-mark* (6).

Upon the evidence it is not open to the Defendants to dispute that we are persons aggrieved.

KEKEWICH, J.:—

Within a few minutes after this case was first opened it occurred to me that such circumstances and facts as were made known raised at once the question whether the applicants were "persons aggrieved" so as to be entitled to make the application which is before the Court, and I should at once have called Mr. *Aston's* attention to it had not Mr. *Rigby* interposed with a word

(1) 26 Ch. D. 288.
(2) 39 Ch. D. 29.
(3) 34 Ch. D. 623.
(4) 54 L. J. (Ch.) 1003, 1007.
(5) 4 Rep. Pat. Cas. 212.
(6) 6 Rep. Pat. Cas. 493.

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to intimate that he should rely on that point. Notwithstanding that, neither Mr. *Aston* in opening or in summing up the case, nor Mr. *Warmington* following him, ever referred to that point at all. Now it is gravely said that the point is not open on the evidence, that in the documents before me there is no reference to it, and that their attention has not been directed to it. I have before me a book of some circulation, much referred to in these matters, in which I find this note: "The first question on an application to rectify the register under this section is whether the applicant is or is not a person aggrieved" (1). Apart from that, I take it for granted it has been present to the minds of the Applicants from first to last, and I cannot hear them say now that they have not had a proper opportunity of giving attention to it. To my mind, the objection that they have not established their case in this respect is fatal to the application. The burden is distinctly on them. The 90th section of the Act of 1883 says, "The Court may on the application of any person aggrieved." Therefore the Applicant, like any other plaintiff, is bound to shew at once, not on the face of his motion or summons, because there is no matter of pleading, but he is bound to state and prove at the outset that he comes within that definition, otherwise his case fails altogether. I should have endeavoured long ago to limit the argument to that point, had I not known that this was the first of a long series of cases, and I thought that probably it was convenient, and I gathered and concluded that counsel also thought it was convenient, that this case should be threshed out from beginning to end, so as to assist all parties and the Court in disposing of the other cases which are behind it. One would expect *a priori*, if one is entitled to expect anything *a priori* with reference to a provision of an Act of Parliament, that the power or liberty given to any person to apply to the Court to have the register rectified would be given to a person not a common informer, not a person suing or purporting to sue on behalf of the public, but a person who has suffered something from that of which he complains. When one turns to the Act one finds that that is the line on which it has been drawn. There is not a suggestion of a common informer, there is not

(1) *Sebastian* on Trade Marks, 3rd Ed. p. 399.

a suggestion of the Attorney-General *ex officio*, or any other representative of the public; but the application is to be made by any person aggrieved.

Again, one would expect that "aggrieved" meant aggrieved by the matter of the trade-mark complained of, by the fact of the registration, or the use of the registration, or the operation of the registration. There again, what one would naturally expect is borne out by the words of the Act. The person is to be aggrieved by the "omission without sufficient cause of the name of any person or of any other particulars from any register kept under this Act, or by any entry made without sufficient cause in any such register." His grievance, his *gravamen*, is to be found in the registration itself, or the operation of that registration, and unless it is to be found there he is not a person aggrieved at all, and is not a person to sue. One soon discovers that the real *gravamen* of the Applicants in this case is that they have been what they are pleased to call boycotted. They use the word themselves, or I should not have done so. They say that the *Apollinaris Water Company* declined to supply them, and for reasons which I do not feel bound or entitled to inquire into. That is their grievance—that they no longer carry on a trade in this particular article because the *Apollinaris Water Company* will not supply them with the water which they desire to sell. If that is an offence against the common law, if there is any improper restraint of trade in that action on the part of the *Apollinaris Water Company*, if there is anything malicious which gives rise to a right of action, that will be tried by proper proceedings. Even supposing they have a right of action, that is not what the Act contemplates. There may be a right of action from the conduct of the *Apollinaris Company*, and which I will assume, though I do not consider it by any means established, to be improper or unfair; but it does not arise from the registration of the particular trade-marks, or from the operation in any way of that registration. Then what is said is this. That in some way or other they being unable to deal in this water, which is part of their ordinary trade, are aggrieved because they lose profit or reputation or what not. That is disposed of by the remarks of all the Judges of the Court of Appeal in succession, who dealt with the

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case of *Riviere's* trade-mark. I think words are to be found in the judgments of every one of the Lords Justices to support the view taken by Lord Justice *Lindley*, who I think was only expressing in his own language what the others expressed in their own language; but I take what Lord Justice *Lindley* said as more conveniently stating for the present purpose that to which I desire to refer. In the report of the case (1), when it came for the second time before the Court of Appeal, he says: "Aggrieved in the sense of being annoyed they certainly were, and I think not without cause; but aggrieved in the sense in which it is necessary they should be aggrieved—in the sense of sustaining legal damage, either immediate or prospective—they have not shewn that they were." These gentlemen are obviously annoyed, and I assume, without considering it established, that they are not annoyed without cause. But that is an entirely different thing to being "aggrieved." I do not think any one of the cases referred to by Mr. *Warmington* in reply at all departs from that. Of course they could not in the least overrule the decision of the Court of Appeal; but I do not think they are in the slightest degree inconsistent with it, or sufficiently near to deserve particular mention. But a more serious point that was made was this. The grievance must be taken to have existed at the date of the registration, and the *Vichy Company* say that what they are complaining of is that this trade-mark was improperly registered, and therefore we must go back to 1876 the date of registration, and see what the state of affairs was then. They say in substance, "If the registration injured us at that time, or would have injured us if we had then been dealing with this particular water, we were then persons aggrieved, and aggrieved we still remain." That is a matter of considerable importance to the Applicants for this reason, that at that time the *Apollinaris Water Company* had only a limited right—large, but still only a limited right—to demand the produce of this *Apollinaris* spring. After the date of the registration they obtained a larger and a far more exclusive right, which effectually prevents the present Applicants from dealing with *Apollinaris* water in this country without its being questioned by the *Apollinaris Company*. Therefore, it is

(1) 53 L. T. (N.S.) 239.

best to go back to the date of registration. I quite agree for many reasons you must look at the date of registration. You must look at the date of registration to see whether it was authorized by the Act of Parliament then in force. You must look at the date of registration to see if the rules which had to be observed were observed. But for this purpose it seems to me entirely wrong to look at the date of registration. The time as a rule when you regard the question whether a plaintiff was aggrieved or not—or, as we call it, had a right of action—is when he issues his writ, when he makes his application. This application was not made until 1886, when the *Apollinaris Water Company* had the larger and more exclusive right to which I have referred. As a rule in the administration of justice in the ordinary course—that is to say, actions instituted by writ—one does not regard for this purpose anything except the date of the issue of the writ; that is to say, if a man has a right of action at the date of the writ, it is no answer to him to say it is gone when you come to the trial. I say as a general rule, because there may be, and probably are, large exceptions; but, for the purpose of considering what one generally has to consider, the important question of who is to bear the costs of the action, that is the date at which one looks. For the present purpose I apprehend, that though it does not make any substantial difference here, you look to the time when the question is tried; because that is a remedy given to the person aggrieved through the interposition of the Court for the benefit of the applicant, and if at the date of the trial he has no cause of complaint it seems to me monstrous to suppose that the Court will rectify the register at his instance when it can do him no good to rectify, and when the retention on the register can do him no harm merely because at the date of his application he may have had some grievance. The point does not arise; but wishing to clear the case as far as I can, I express my opinion upon it. It is sufficient for the present purpose to take it back to 1886, when notice of motion was given. Now, how can they be possibly aggrieved from that point of view? The Applicants wish no doubt to sell *Apollinaris* water. They must sell *Apollinaris* water in one of two ways. They must either sell real *Apollinaris*, in which

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case they must purchase it from the *Apollinaris Company*, and if that company will not sell, and improperly will not sell, they may have, as I say, a right of action. I cannot see any grievance by reason of the registration—that is, grievance within the meaning of the Act from that point of view. But they may wish to sell something which is not *Apollinaris* water—that is to say, something which does not come from the *Apollinaris* spring, and to call it *Apollinaris* water. They may be prevented from doing that to some extent by the registration. But that would be wrong apart from the registration, and they would not really be relieved by this trade-mark being off the register, nor would the Court, I apprehend, be anxious to enable them to do that which would be according to their view of the word "*Apollinaris*" dishonest.

In neither point of view, it seems to me, have they any grievance within the meaning of the section. What I apprehend the section to mean is this: if the existence of a trade-mark, admitted for this purpose to be improper—that is to say, to contain some name which ought not to be there, and to have omitted some entry which ought to be there—if the existence of such a trade-mark prevents a man from doing that which is lawful, and which it would be possible for him to do without the existence of that trade-mark, then he is a person aggrieved, he suffers damage, he is prevented from pursuing his lawful calling, doing that which as one of Her Majesty's subjects he is entitled to do, by the existence on the register of something which ought not to exist. In such a case he is entitled to come to the Court, and say, "Remove the obstacle to my doing that which is lawful." But if he has no such case as that, he does not, to my mind, come within the section at all. He is not a person entitled to call for the interposition of the Court. The other points which have been raised in this case are some of them extremely interesting to a lawyer, some of them by no means without difficulty, some of them, I think, not actually novel; perhaps some of them will arise in the other cases that are to follow, and I shall have the benefit of the arguments which I have already heard, and of the consideration which I have necessarily given to the points as they have arisen. But disposing of the case on the point which

I have mentioned, I think it is unnecessary, and robably also inconvenient to say anything more about them.

On that one ground the application fails, and the motion must be refused with costs.

The motion to expunge the *Friedrichshall* trade-marks, Nos. 45,096, 45,097, and 48,933, and the *Hunyadi Janos* marks, Nos. 6356, 6357, and 9026 were then heard.

His Lordship refused the application. In the case of the *Friedrichshall* marks he gave costs to the *Apollinaris Company*; but in the case of the *Hunyadi Janos* marks he gave costs to the *Vichy Company*, holding that in that case they had been aggrieved by a threat of the *Apollinaris Company*, which had only been removed very shortly before the hearing. In the view taken by the Court of Appeal of these motions it is unnecessary to report the judgment of Mr. Justice *Kekewich* at length.

On the motion by the *Apollinaris Company* to register the word "*Apollinaris*" as a trade-mark in respect of salts in Class No. 3, trade-mark 45,591.

Rigby, Q.C., *Neville*, Q.C., and *J. Cutler*, for the motion:—

The word "*Apollinaris*" is a fancy word not in common use within sect. 64 of the Act of 1883, or an invented name within sect. 10 of the Act of 1888, or if not an invented name, is one not descriptive of quality or character within that section. The application is made under the Act of 1883; and while sect. 113 of the Act of 1883 provided that applications under the Act of 1875 were to go on, sect. 27 of the Act of 1888 protected any rights acquired before its commencement, the effect of which is that a right to register under the Act of 1883, being a right acquired before the Act of 1888, and the Act of 1883 having to be read in the Act of 1888 with this modification, the applicant for registration can claim the benefit of any extension of right under the later Act, and at the same time have recourse to the earlier Act if the later cut down any pre-existing right: *In re Burgoyne's Trade-mark* (1); *In re Baschiera's Trade-mark* (2). The object of the Act of 1888 was to extend the area of words

(1) 61 L. T. (N.S.) 39. (2) 33 Sol. J. 469.

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which might be registered, and to relieve traders from the difficulty caused by the decisions of the Court, which had so limited the range of fancy words as to make it almost impossible to find one that could be upheld.

The name is not "geographical" within the Act of 1888. A name is not geographical because applied to some house or place—*e.g.*, "*St. Paul's Soap*" would not be geographical merely because, on looking over the face of the globe, some place bearing the saint's name might be found. In *Edwards* v. *Dennis* (1), the "*Neptune*" trade-mark was adopted from *Neptune Street*, where the works stood.

Aston, Q.C., *Warmington*, Q.C., *Sebastian*, and *F. M. Abrahams*, were not called upon.

KEKEWICH, J.:—

The *Apollinaris Company* desire to register, with reference to salts to be extracted from the *Apollinaris* water, or to represent the salts which could be extracted from that water, the word "*Apollinaris*" in the proper class, and they say that they having got the word "*Apollinaris*" on the register, that it having been now determined, as far as I am concerned, that "*Apollinaris*" must remain on the register with reference to the *Apollinaris* water, it follows that they are entitled to extend it to salts. If there were any decision to that effect, of course I should at once follow it. If I could see any principle that would fairly lead me to that conclusion, I should at once adopt it. But there is no decision, and I fail to see any principle. The Applicants come to have a particular trade-mark registered. I think it is incumbent upon them to shew that they are right according to the ordinary rules; that they are proposing to have registered a trade-mark which, according to those rules, can be properly registered. It is not sufficient for them to say, "Rightly or wrongly, we got the mark on the register some time ago for other goods, and, being there, that trade-mark for those goods not being capable of being removed, we are entitled to extend it." I therefore deal with the case upon its merits, as if there

(1) 30 Ch. D. 454.

never had been any registration up to the present time, and as if they were coming now for the first time and asking to register "*Apollinaris*" for salts. I do not mean to say I wish to forget, or do forget, or can forget, as part of the history of the case, that "*Apollinaris*" is registered with reference to the *Apollinaris* water. I cannot lay that aside, but what I do mean is that that is not to prejudice the case in favour of the Applicants.

That being so, they apply under the Act of 1883, and, pending the application, which has been adjourned from time to time for a long time, that Act of 1883 has been amended, so that now the Court has before it, for its guide, the amending Act of 1888. The construction which Mr. *Rigby* asks me to put upon the statutes in this point of view is: If the Applicants are entitled to have this word registered under the Act of 1883, then it ought to be registered, and if the Act of 1888 has in any way affected that right in words, that is not to have effect, but they are still entitled to register under the Act of 1883. If, on the other hand, the Act of 1888 has enlarged the right of the Applicants so that they could now register under that Act what was not capable of registration under the Act of 1883, they are entitled to call in the aid of the later Act, and to use it for their benefit, though it cannot be used against them. To my mind, that is the correct reading of the statute, and I propose to regard the application according to that reading.

I therefore turn first to the Act of 1883, and there, if the Applicants can succeed at all, they must do so under sub-sect. 1 (*c*) of the 64th section; that is to say, they must shew that the word *Apollinaris* is "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words, not in common use." *Apollinaris* describes, according to the evidence, the water which issues from the earth at a particular spot, which has been named the *Apollinaris* spring, using the English language, and it is known and has been known, at any rate, for something like forty years, as indicating that particular thing. That seems to be the true result of the evidence on both sides. This designation has been used commonly, not only by the public who consume it, but by the many persons who have traded in it for the best part of these forty years. The word *Apollinaris* has in that sense been in

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common use; it has been common to the trade, common to all persons who sold that particular water. There are many of them, and they have sold largely. Therefore, adopting the construction of the word "common" which was adopted by Mr. Justice *Chitty* in the case of *Burland* v. *Broxburn Oil Company* (1), the word *Apollinaris* has been in common use.

But I do not think I need rest my judgment upon that, because I think it is not in any proper sense of the word a fancy word. How *Apollinaris* came to be adopted for the spring has been explained at length by a gentleman whose evidence has been undoubted—the son of the man who himself superintended the boring which led to the discovery—and it is clear from that evidence that he, owing to an accident of the moment, chose for the name of the newly-discovered spring the name of the saint who was well known before, from whom I have it in evidence a hill in the neighbourhood was named and a church was also named. It is evident from the statement of this gentleman that the saint was, if I may venture to say so, a household saint in the family, at that time well known. The word is in no sense in which I can construe it a fancy word.

That seems to me to dispose of the application under the Act of 1883. Sub-sect. 2 of sect. 64 can hardly be of any assistance because that speaks only of addition of words to a device or to something else before described, and here I am only dealing with the word "*Apollinaris.*"

Then, failing under the Act of 1883, do they come under the Act of 1888? There, no doubt, we have entirely different words, and words which may be of more assistance to the Applicants. I pass over again the sub-sect. 1 (*c*) of the amended sect. 64, "a distinctive device, mark, brand, heading, label, or ticket," which form only a part of sub-sect. 1 (*c*) of the section of the previous Act, and I go on to sub-sect. 1 (*d*), "an invented word or invented words." In one sense *Apollinaris* has been invented no doubt—that is to say, there has been appropriated to the water issuing from this spring the name of a saint well known in the neighbourhood, as I have said, and whose name had been already given to a hill and a church. It was not invented

(1) 42 Ch. D. 274.

in that way, but it was invented no doubt as applied to water. I am far from saying—I think the cases go the other way—that you may not take some word used for an entirely different purpose, some foreign word it may be, or a combination of foreign words, or even a combination of English words, which would be applicable to some entirely different purpose, and still say it is invented for the purpose in hand. If that question is to be argued as an abstract question, that argument must be deferred for the present. But here there is nothing approaching to invention, but merely an application to the spring of that which was already applied to other things in the immediate neighbourhood. A stronger argument, I think, on behalf of the Applicants rests on sub-sect. 1 (*c*), "A word or words having no reference to the character or quality of the goods, and not being a geographical name." I cannot think that the word "*Apollinaris*" as applied to salts could be looked upon as a word having no reference to the quality of the goods, within the meaning of the section. I think there is room for a different opinion upon that; but without saying more upon it that will be my conclusion. The character seems to me to be directly indicated, or, to use the language of the statute referred to, *Apollinaris* means *Apollinaris* water, that is, natural *Apollinaris* water issuing from that particular spring. *Apollinaris* salts must, I think, mean salts of the character contained in *Apollinaris* water, and I think, therefore, the word has reference to the character of the goods.

But more than that, I think it is a geographical name. Mr. *Neville* has argued that particular point with great ingenuity, and I was impressed by some of the examples he gave me. He says geography means in the first instance and properly a description of the divisions of the earth. That is so accepted. Then he says that means continents, countries, towns, villages, and so forth, and not a spring such as this, with the establishment for the supply of water which may be changed at the will of the owner to-morrow and be named something quite different. If it were changed, there might be something to be said; but when for forty years a place has had a particular name, though at the will of the owners, and has found its way into common parlance, and I doubt not, though it has not been proved, into the maps and

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guide-books, and other places where one looks for distinctive names, it is part of the geography of the country, and it has passed for the moment into that geography, and this place is known geographically as *Apollinaris Spring.*

It seems to me entirely unlike the illustration he gave of *Monkey Island* as applied to soap. One cannot jump to the conclusion that *Monkey* soap has any connection with *Monkey Island.* You have to make some inquiries. If ultimately search led you to that conclusion, then it would be a geographical name. Again, the place which he named in the *United States, St. Paul,* if you could in any way identify the goods with the place, even though you had to search the map for it, then the name would be geographical; but you would not jump to the conclusion that it was intended to apply to any particular place, whether in the *United States* or elsewhere, unless it was reasonably obvious on the face of it. A more apposite illustration occurs to me in that case of the *Melrose* hair-restorer. There is one *Melrose,* a *Melrose* known to all, a *Melrose* which has been celebrated, and, as far as I am aware, and as far apparently as anyone else is aware, there is only one *Melrose.* There is the *Melrose* of *Scotland*—the *Melrose* of *Scott*—and it is a thoroughly well-known place. Therefore, when you find a thing described as *Melrose* you jump at the conclusion necessarily, not absolutely unrebuttable by evidence, but you jump at the conclusion that it points to *Melrose,* and then you have a geographical name. Here *Apollinaris* is thoroughly well known. Therefore, when I come across the word "*Apollinaris*" I naturally, and I say properly, jump to the conclusion that it means the *Apollinaris* which is situate in this particular valley, and which has given the name to this queen of table waters, as it is called. Therefore, I think, on that ground also it is a word which cannot be registered.

Then I am told that the Act was intended to enlarge the choice of traders. It may be so. I think that is a fair comment on the Act of 1888 as compared with that of 1883, still it must be construed according to the ordinary rules of construction.

As regards the last argument of all, that is—that it is to the interest of the trade not to construe it narrowly—I must leave that to an entirely different tribunal. I must construe it to the

best of my ability properly. If that proper construction, being the right one, is not in the interest of the trade, that interest must be dealt with elsewhere.

The application must be dismissed with costs.

It was then admitted by counsel for the *Apollinaris Company* that they could not distinguish the applications for registration in Class 3 of the words "*Friedrichshall*" and "*Hunyadi Janos*" (Nos. 45,589 and 45,590), and these applications were also dismissed with costs.

The summons by the *Apollinaris Company* for leave to proceed with the registration of the three Malay labels for *Apollinaris* water (Nos. 44,218, 44,219, and 44,220) was next argued.

Rigby, Q.C., *Neville*, Q.C., and *John Cutler*, for the *Apollinaris Company*:—

These are distinctive labels and should be registered.

Warmington, Q.C., and *Sebastian* (with them *Aston*, Q.C., and *F. M. Abrahams*), for the *Vichy Company*:—

The top part of the label is the old label of the German *Apollinaris Gesellschaft*, the former owners of the spring, and has never been assigned to the *Apollinaris Company, Limited.* It is said that the *Gesellschaft* consent to the application; but that fact, if it is a fact, is immaterial. The *Apollinaris Company* disclaim certain of the common words on the label, but they did not disclaim the words "*Apollinaris Brunnen*," as they should have done under sect. 74 of the Act of 1883. *In re Hudson's Trade-marks* (1) shews that in an application under the Act of 1883, such as this is, words in a label which are common to the trade ought to be disclaimed. It is too late to disclaim after the application has been put in: *In re Goodall's Trade-mark* (2). The translation of the Malay characters supplied to the Comptroller says that the *Apollinaris* spring is the property of the *Apollinaris Company, Limited.* The company have filed evidence to shew that the translation was altered inadvertently, that the Malay really means that the *Gesellschaft* is the proprietor. If the

(1) 32 Ch. D. 311; 3 Rep. Pat. Cas. 155. (2) 42 Ch. D. 566.

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original translation sent in is right, the statement is untrue and deceptive: *Leather Cloth Company* v. *American Leather Cloth Company* (1). If the corrected translation is right, then the label tells the purchaser that the spring and the water coming from it are the property of the *Gesellschaft*, and the label is not distinctive of the *Apollinaris Company, Limited: In re Wood's Trade-mark* (2).

Neville, in reply, as to the necessity for a disclaimer:—

It is not too late to disclaim: *In re Swift Specific Company's Trade-mark* (3). But this is not a case in which any disclaimer can be required. The words "*Apollinaris Brunnen*" are not common to the trade, and never have been.

[KEKEWICH, J., referred to *Burland* v. *Broxburn Oil Company* (4), and *Humphries* v. *Taylor Drug Company* (5).]

Goodfellow v. *Prince* (6) shews that the *Apollinaris Company* are entitled to register these labels, though the water is obtained from abroad. Even if the words "*Apollinaris Brunnen*" should be in any way common to the trade, yet the spring is where the company carry on business, and under the amended sect. 64 (3) the name of the place of business need not be disclaimed.

[*Sebastian*:—The company is an English company, with a registered office in *Regent Street*.]

KEKEWICH, J.:—

What I have to consider here is an application by the *Apollinaris Company* to register a particular label; and for the purpose of my judgment, I may treat it as if there were only one, No. 44,218; because, though there are three, the other two only differ in one particular, that is to say, the shape of the figure which appears in the centre of each label.

I start with a statement by the Applicants that they do not claim the exclusive right to use certain parts of that label.

(1) 11 H. L. C. 523.
(2) 32 Ch. D. 247.
(3) 6 Rep. Pat. Cas. 352.
(4) 42 Ch. D. 274; 6 Rep. Pat. Cas. 482.
(5) 59 L. T. (N.S.) 820.
(6) 35 Ch. D. 9.

Those particular parts are specified in the 13th paragraph of the affidavit of *Julius C. Prince*, the secretary, sworn on the 4th of March, 1886. They have not disclaimed those words in the way prescribed in the Act, but they do at the Bar say they intended and desired to disclaim, and I must treat them as having inadvertently omitted that disclaimer from their application for registration. How that is to be dealt with must be considered hereafter. Treating that disclaimer as made, there are only two objections to the label. The first is that the label still contains words common to the trade, or a word common to the trade, "*Apollinaris-Brunnen*," which ought, therefore, to be disclaimed, and which the company do not express a wish, or intend, unless compelled to disclaim; and, secondly, that the label cannot be registered at all as a trade-mark, because of its not being the property of the Applicants. I said there were only two. There is a third. It is said there is on the face of the document, or rather there is in the indorsement of the document which contains a translation of the foreign language, a misrepresentation, such as, either under the judgment of the Court of Appeal in *In re Wood's Trade-mark* (1), or on the broader principles of equity as generally applied, irrespective of the decision in any particular trade-mark cases, ought to compel the Court to say registration shall not be sanctioned, and no application on the part of the persons making such misstatement shall be assisted. I did not call upon Mr. *Neville* to reply upon that last point. A mistake has been made in the translation; that mistake, I think, ought to be rectified, though it is immaterial, because either this foreign language will be read by foreigners who understand it, in which case they would know the real meaning and not be misled by the translation, or it will be read by persons who do not understand it, and then they cannot be misled, because they will not know what is the correct meaning. Still, a misrepresentation, a mistake or mistranslation, having been made by accident in a record filed with the Comptroller, I think it would be right in some way or other that that should be corrected, and perhaps how that is to be done may, like the disclaimer, deserve consideration.

(1) 32 Ch. D. 247.

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Then the next point I will take is what I mentioned secondly, namely, that this is not a trade-mark of the present Applicants, the company, but if it is the label of anybody, is the label of *Kreuzberg*, or a person claiming by proper title through him, and that the company cannot claim it now. Mr. *Sebastian* has referred me to what I had forgotten, a particular statement in the same affidavit of Mr. *Prince* at the end of paragraph 10, in which he says that the upper part of this trade-mark—that is to say, the label—is a representation of one of the labels referred to in the company's contract with the German company, the *Gesellschaft*, as it has been called, which had been previously used, that is to say, before the date of that contract, and therefore presumably used by others than the *Apollinaris Company*. The successors of *Kreuzberg*—that is to say, the German company—assent to and approve of this application, as indeed they were bound to do under their contract. It is to their advantage; but still if they themselves could not apply, their consent will not make any difference. Their consent may add to the title of the Applicants; but if they themselves had no right, they could not otherwise assist the Applicants. Really the case of the opponents on this point is rested on the case of *Goodfellow* v. *Prince* (1). But to my mind, *Goodfellow* v. *Prince* does not really touch the point. What has fallen from the Lords Justices is, of course, entitled to my best attention; but it must be remembered that there the point before the Court was a motion to restrain the use of a name and not an application for registration, and that Lord Justice *Lindley* particularly points that out, and says (2), the plaintiff has not registered any trade-mark. If the plaintiff there had registered a trade-mark he would have been entitled to maintain the action. At least, that is my conclusion from what the Lords Justices say. If the French firm, *Moigneaux Père et Fils*, had been the plaintiffs, as Lord Justice *Lindley* supposes, in order to test the case, then that would not have advanced the case at all, because they had not got any registered trade-mark. But here I am considering whether this company is entitled to register a trade-mark, not whether, having no trade-mark, they are entitled to restrain the use of this label. It seems to me that they, being in pos-

(1) 35 Ch. D. 9. (2) 35 Ch. D. 20.

session of the trade, representing under the contract the persons entitled to use these labels, and having their express sanction under the contract, and also by every proved fact here, are entitled to come forward and say, "This shall be, though it is not up to the present time, our trade-mark, and shall be registered in our name," and that the consent of no one else is required. Nor does the fact that *George Kreuzberg's* name appears, or that he may have used the label, or somebody claiming through him may have used the label, make any difference.

Now, I come to the last point, which is the one which has caused me, I confess, considerable doubt and difficulty. Are the Applicants, being, as I hold, otherwise entitled to register this trade-mark with such a disclaimer as I have pointed out, entitled to have it registered without a disclaimer of "*Apollinaris-Brunnen*"? That depends upon whether, now I have heard the whole case, that is a word common to the trade. I have already held that "*Apollinaris*" means what is sworn to be the meaning. It means water coming from the *Apollinaris* spring. It is known to us all now, whether we could know it otherwise or not, by the evidence and discussion, that "*Apollinaris-Brunnen*" means the *Apollinaris* spring; and, therefore, that indicates the spring which yields *Apollinaris* water, or it may mean the water from the *Apollinaris* spring. Is that common to the trade? At the present moment, and for some years past, the company have secured the exclusive right of purchasing this water and selling it. They having purchased it, may sell it to others, who may sell it again; and, as a matter of fact, it has been sold by persons claiming through them since they purchased that exclusive right, and it was sold before that by many other persons for a large number of years. Therefore, in one sense, it certainly is common to the trade—that is to say, it is a word used, frequently used, and commonly used, by those who deal in mineral waters. Is that common to the trade? Mr. Justice *Chitty*, when he had the case before him which has been referred to, found a synonym for "common," and he considered it equivalent to "open to the trade" (1). He takes the words, as I do, from the Act—"the trade." What trade? It does not necessarily mean all the world, though what any

(1) 42 Ch. D. 280.

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particular trade may use all the world may use; but for the purpose of construction we must look at the words. "The trade" I understand to mean those who deal in any way in the particular article—that is to say, in mineral waters of the class within which *Apollinaris* water comes; or, if you will, those who deal in aërated waters. Then, it has been used; it may be used; any persons may use it now. It is the case of the *Apollinaris Company*, that even their rivals, if they can only get it, may sell it as much as they like, and sell it as *Apollinaris* water, and may sell it as *Apollinaris-Brunnen* water coming from the *Apollinaris* spring. Therefore, in that way, I think, it is open to the trade. The meaning of the words is decided by Mr. Justice *Chitty* there, and I accept entirely Mr. Justice *Chitty's* language and exposition; and I only refer to my own because I am always reluctant to state the same conclusion in different language. For that reason, lest anything I might say at the present moment might be, by criticism, construed to be different from what I have said before, which I do not intend it to be, I will use my own language in a case which was decided before that case of Mr. Justice *Chitty's*: *Humphries* v. *Taylor Drug Company* (1). I am reading from page 822: "It is to be observed that the words are 'common to the trade,' and not 'common in the trade.' Any word which the trade might have used at the date of registration is, as I construe the Act, common to the trade. I think it means that a word which might have been used for these particular goods by any other person at the time is a word common to the trade." That was my definition then; and seeing it is entirely consistent with, and indeed supported by, Mr. Justice *Chitty's* decision, I am not disposed to go back from it. I think that, according to that definition, this word "*Apollinaris-Brunnen*" was, at the date of the application for registration, and has been ever since, and is now, common to the trade; and, I think, therefore, that the application cannot be allowed to proceed unless that word is disclaimed.

Mr. *Neville*, at the last moment, started a point which, I think, deserves some consideration as regards this, that, though it may be common to the trade—which, of course, he did not admit—it

(1) 59 L. T. (N.S.) 820.

need not be disclaimed, because it is the place of business and the 3rd sub-section of sect. 64 as amended makes it unnecessary to disclaim. The words are, the name of the Applicant, or the foreign equivalent therefor, or his place of business. I think *Apollinaris-Brunnen* cannot be treated as the place of business of the company. They are an English company, registered in *England*, having, therefore, their registered office in *England*. Their domicil, to use a familiar and expressive phrase, is English; and, though they may have, and probably have, many places of business, I think when you come to an Act of Parliament which speaks of the company's place of business, that must mean what lawyers call the domicil of the company. It is true that a great part of their business—the essential part of their business—is carried on at the site of the spring; and it may be that it is a more important place than any other, but still I do not think it is their place of business, so that I can relieve them from disclaiming on that ground.

Now, as regards the way in which this is to be done. The section distinctly says that the disclaimer must be made in the application; and there has been no disclaimer made in the application. It is not only as regards what I hold ought to be disclaimed, and which the company say need not be disclaimed, but also what they are willing to disclaim. As I say, it has not been disclaimed in the application. In one case (*Swift Specific Company's Trade-mark* (1)), Mr. Justice *Stirling* thought that the application there should proceed with a disclaimer, and that has been treated as a decision that he might order it to proceed with a disclaimer. I think he must have considered the point, because he puts the question himself to counsel (2): "Why did you not disclaim on your application?"—and the answer was given: "It is not necessary." I suppose he thought it was not necessary. On the other hand, I think there the question really was whether the registration should be allowed with disclaimer or not, and there was no opposition to registration with disclaimer; and possibly it might have gone without full consideration of the question whether the Court had power to do it or not. That, I think, the more likely, because Mr. Justice *North*, who had occasion

(1) 6 Rep. Pat. Cas. 352. (2) 6 Rep. Pat. Cas. 354.

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to go into this particular question says that Mr. Justice *Stirling* had a similar matter before him the other day, and he did not decide it. Then, in that very case that I have just quoted from of my own (*Humphries* v. *Taylor Drug Company* (1)), the question was raised; but there there was registration. The registration was perfect, and I was asked not to allow an application to proceed with a disclaimer, but to allow an entry to be made on the register; and the point now in consideration did not arise. I think that the application itself must specify the disclaimer; and I do not see any power in the Court to make any disclaimer, or to permit a disclaimer to be entered, or anything of the kind. At the same time, it seems to me extremely unlikely that some errors cannot be corrected; clerical errors certainly can. Errors that ought to be corrected can be corrected. It is unlikely, I think, that the Comptroller has not the power to do it. But, at any rate, it might be got over in this way, that the Applicants might make a new application, and disclaim in that. I do not wish to intimate anything, but I think that is a necessary result. But, seeing, as I say (at least I venture to think I do), that in this case they will not now consent to disclaim "*Apollinaris-Brunnen*," and that it is useless to enter a disclaimer of anything else which will not be, in my opinion, a perfect disclaimer; I must, therefore, refuse this application with costs; but this order I make will be without prejudice to any amended application to the Comptroller to register this label, with such disclaimers and corrections as the Applicants may be advised to make.

It was then admitted by counsel for the *Apollinaris Company* that they could not distinguish the applications for registration in Class 44 of the "*Friedrichshall*" labels, Nos. 45,699, 45,700, and 49,535, in which cases they refused to disclaim the word "*Friedrichshall*," which appeared prominently on each of the three labels, and the applications to proceed with the registration of these labels were also dismissed with costs, without prejudice to any amended applications to register the labels with such disclaimers and corrections as the Applicants might be advised to make.

A. C. E.

(1) 59 L. T. (N.S.) 820.

The *Vichy Company* appealed from the judgments as to the trade-marks Nos. 6356, 6357, and 9026, 2076, and 4122, 45,096, 45,097, and 48,933, except so far as concerned the costs of the motion as to the first three of these marks.

The *Apollinaris Company* appealed from the judgments as to the trade-marks Nos. 45,591, 44,218, 44,219, 44,220, 45,589, 45,591, and 49,535, and also (by special leave) from the order as to the costs of the motion to expunge Nos. 6356, 6357, and 9026. There was no appeal as to the trade-marks Nos. 45,699, 45,700.

The appeals came on to be heard on the 26th of November, 1890, the *Vichy Company's* appeals being argued first; and the Court decided to hear the arguments on the preliminary point as to the *Vichy Company* being "persons aggrieved" in all the cases before proceeding to the merits.

Sir *R. E. Webster*, A.G., and *Sebastian* (with them, *Aston*, Q.C., and *F. M. Abrahams*, in the *Hunyadi Janos* appeal; *Aston*, Q.C., in the *Apollinaris* appeal: and *Warmington*, Q.C., in the *Friedrichshall* appeal), for the *Vichy Company*:—

The trade-marks for *Hunyadi Janos* and *Apollinaris* water now in question were registered under the Act of 1875, and by sect. 113 of the Act of 1883 the validity of the registrations depends upon the question, whether the registrations were or were not in accordance with the requirements of the earlier Act. The trade-marks for *Friedrichshall* water were registered under the Act of 1883. The registrations must have been good under the Act in force when they were effected, if they are good at all, and nothing that has happened since can make them good now if they were not good then: *In re Wood's Trade-mark* (1).

The first and principal question to be considered is whether the *Vichy Company* is "aggrieved" by the registrations, and for this purpose it must be assumed that the registrations were wrongful. On this assumption everyone interested in the same trade as that of the registered proprietors is aggrieved. The registrations enable the *Apollinaris Company* to hamper the trade in a way in which they could not hamper them but for

(1) 32 Ch. D. 247.

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the registrations, viz., by enabling them to prevent the sale in *England* of genuine water from the foreign spring, bottled and labelled by the owners of the spring. The water could be procured on the Continent, either directly or indirectly from the spring; but these registrations are used to stop the trade, and the *Vichy Company* are aggrieved: *Rose* v. *Evans* (1); *In re Riviere's Trade-mark* (2); *In re Riviere's Trade-mark* (2.) (3); *In re Hayward's Trade-marks* (4); *In re Spencer's Trade-marks* (5); *In re Ainslie & Co.'s Trade-mark* (6); *Thompson* v. *Montgomery* (7); *In re Batt's Trade-mark* (8). But for the registration in the name of the *Apollinaris Company*, the *Vichy Company* would be in the same position as the defendants in the case of *Richards* v. *Butcher* (9). The *Apollinaris Company* could not stop them from selling water under the trade-marks, nor could the owner of the spring, if the water were genuine and bottled by him. The oppressive way in which the *Apollinaris Company* are able to use their registrations appear from *Apollinaris Company* v. *Herrfeldt* (10), and *Apollinaris Company* v. *Snook* (11).

Again, the evidence shews that water containing the same chemical constituents as these three natural waters can easily be, and in fact has been, manufactured for sale, and if so it is proper, and in such cases is usual, to use the names of the springs as descriptive of the artificial water, and there is nothing wrong in so doing if the water is not represented to be natural water. This trade is destroyed by the registrations, for if the waters are manufactured they can only truthfully be sold as artificial "*Apollinaris*," &c. This constitutes a grievance.

Another grievance is, that when the *Vichy Company* were opposing the *Apollinaris Company's* new applications for registration, they were met by references to the registrations now attacked, so that their registrations are being utilized in actual litigation between the same parties.

As to 48,933, the last objection holds good; and, moreover,

(1) 48 L. J. (Ch.) 618.
(2) 26 Ch. D. 48.
(3) 53 L. T. (N.S.) 237.
(4) 54 L. J. (Ch.) 1003.
(5) 3 Rep. Pat. Cas. 73.
(6) 4 Rep. Pat. Cas. 212.
(7) 41 Ch. D. 35; 6 Rep. Pat. Cas. 404.
(8) 6 Rep. Pat. Cas. 493.
(9) 7 Rep. Pat. Cas. 288.
(10) 4 Rep. Pat. Cas. 478.
(11) 7 Rep. Pat. Cas. 474.

the mark is clearly not intended for use in this country at all. It is simply the central part of *Oppel & Co.'s* new mark, which the *Apollinaris Company* are now trying to register as No. 49,535, and which expressly states it is not for use in *England.* This mark, 48,933, has therefore been registered, not for any *bonâ fide* trading purposes, but in order to prevent the importation of genuine water.

Rigby, Q.C., *Neville,* Q.C., and *John Cutler,* for the *Apollinaris Company*:—

The applicants are not aggrieved; for, as to the *Apollinaris* water, the whole output is in the hands of the *Apollinaris Company,* and none can be obtained which has not come from them. As to the other two springs, *Saxlehner* and *Oppel & Co.,* the proprietors of them respectively, are bound by contract with the *Apollinaris Company* not to sell for export to *England,* except through the *Apollinaris Company.* Notices of the contracts are placed on all the labels under which these waters are sold for Continental consumption, so that knowledge of the contracts is brought home to all who buy and sell these waters, and they are not at liberty to disregard them: *Heap* v. *Hartley* (1). Consequently there can be no grievance, for the registrations do not interfere with any possible commercial enterprise: *In re Riviere's Trade-mark* (2) is in point.

The sale of artificial waters has been so trifling that it may be disregarded. Further, it is not consistent to say that the three names of the springs indicate both the waters derived from the springs and also waters not derived thence, but artificially prepared, and the names ought not to be used for artificial preparations.

The references made to the registrations in the affidavits filed on the pending applications are of no importance. These registrations afford no ground for granting the new applications, and the references to them are meaningless, and constitute no grievance..

[They referred also to *Edwards* v. *Dennis* (3).]

(1) 42 Ch. D. 461; 6 Rep. Pat. Cas. 495. (2) 53 L. T. (N.S.) 237.
(3) 30 Ch. D. 454.

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Warmington, Q.C., and *Grosvenor Woods*, watched the appeal as to the *Hunyadi Janos* marks, on behalf of *Saxlehner*.

Sir *R. E. Webster*, A.G., in reply.

At the conclusion of the arguments on the preliminary point the Court intimated that they would reserve their judgment on that point, and hear the appeals on their merits.

Counsel for the *Apollinaris Company* thereupon stated that they could not prove such user before the 13th of August, 1875, of the words "*Hunyadi Janos*," "*Apollinaris*," and "*Friedrichshall*," constituting the trade-marks Nos. 9026, 2076, and 45,097, as would amount to user as a trade-mark within *Perry Davis & Son* v. *Harbord* (1); but they contended that the words, if removed from the register, could be immediately re-registered under the Act of 1888, and that the Court would not direct a rectification which would be a nullity.

The Court intimated that, having regard to the necessity for advertisement in the *Trade Marks Journal*, they would not call on counsel for the *Vichy Company* as to this point.

The arguments then proceeded as to the remaining registered marks.

Sir *R. E. Webster*, A.G., and *Sebastian* (with them *Aston*, Q.C., and *F. M. Abrahams*, in the *Hunyadi Janos* appeal; *Aston*, Q.C., in the *Apollinaris* appeal; and *Warmington*, Q.C., in the *Friedrichshall* appeal), for the *Vichy Company*:—

As to the *Hunyadi Janos* labels Nos. 6356, 6357. These are simply the central portions of labels used by *Saxlehner*, and they have not been assigned by him to the *Apollinaris Company* with the goodwill of his business. He never made any assignment to them: *Edwards* v. *Dennis* (2).

He never authorized them to register the labels as their own; but, even if he had done so, it would not place the *Apollinaris Company* in any better position, for he had no power to authorize them to do so. The *Apollinaris Company* never had any exclusive right to these marks, nor any greater right, apart from the regis-

(1) 15 App. Cas. 316. (2) 30 Ch. D. 454.

tration, than the plaintiffs in *Richards* v. *Butcher* (1). The marks are on the face of them *Saxlehner's* labels, and they cannot be registered by anybody else: *In re Wood's Trade-mark* (2). The effect of the registration is to give the *Apollinaris Company* an exclusive right to the words "*Hunyadi Janos*," which cannot belong to them. As to No. 6357, the caution as to "imitations" is misleading and improper.

As to the *Apollinaris* mark No. 4122. At the date of registration the *Apollinaris Company* were merely importers, and had not the whole output; consequently they were not entitled to register as their own a mark which was in fact *Kreuzberg's*, even with his consent, nor to claim the words "*Apollinaris Brunnen*," which are a material part of the mark. The statement that they had used the mark before 1875 was untrue in the sense in which it was meant to be understood. They had used it as dealers in the water, not as proprietors of the spring. The claim of old user was therefore deceptive, both as regards the Registrar and the public: *Baker* v. *Rawson* (3). Again, in their application for registration, the *Apollinaris Company* alleged that the mark was branded on the corks by them. This was untrue; it was in fact branded by *Kreuzberg*, and the company had nothing to do with it. These defects in the registration when it was effected cannot be cured by the fact that the *Apollinaris Company* have since acquired the control of the spring: *Barlow* v. *Johnson* (4); *In re Wood's Trade-mark.*

As to the *Friedrichshall* label No. 45,096. This label was registered under the Act of 1883, and the word "*Friedrichshall*" and other matters should have been disclaimed under sect. 74: *In re Hudson's Trade-marks* (5) *Burland* v. *Broxburn Oil Company* (6); *Baker* v. *Rawson.* The *Apollinaris Company* never had any exclusive right in the name: *Singer Manufacturing Company* v. *Wilson* (7); *Singer Manufacturing Company* v. *Loog* (8).

[FRY, L.J., referred to *Linoleum Manufacturing Company* v. *Nairn* (9).]

(1) 7 Rep. Pat. Cas. 288.
(2) 32 Ch. D. 247.
(3) 45 Ch. D. 519.
(4) 7 Rep. Pat. Cas. 395-400.
(5) 32 Ch. D. 311; 3 Rep. Pat. Cas. 155.
(6) 42 Ch. D. 274; 6 Rep. Pat. Cas. 482.
(7) 3 App. Cas. 376.
(8) 8 App. Cas. 15.
(9) 7 Ch. D. 834.

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The label has on it the name of *Oppel & Company* as proprietors, and it cannot be registered by anyone else: *In re Wood's Trade-mark* (1). It states that the *Apollinaris Company* are "sole exporters," *i.e.*, from *Germany*, which is untrue: *In re Hayward's Trade-marks* (2). It is deceptive as a whole. But for the disc in the centre the label could not be registered at all: *In re Bryant & May* (3), and that disc is a separately registered trade-mark. The words "trade mark" are so placed on the label as to represent that the disc is the trade-mark and nothing else which is deceptive to the public.

As to the *Friedrichshall* mark, 48,933. This is simply the central device of *Oppel & Company's* new German label, which is not intended for use in *England* at all, and the mark has been registered by the *Apollinaris Company* to hamper trade, and not for any *bonâ fide* trade purpose. They claimed in their application to be the proprietors of the mark, whereas they never have been anything of the kind.

Rigby, Q.C., *Neville*, Q.C., and *John Cutler*, for the *Apollinaris Company*:—

As to the *Hunyadi Janos* labels, Nos. 6356, 6357. We admit these are the central portions of *Saxlehner's* former labels; but the *Apollinaris Company* became entitled to them as his successors in business, when he contracted to make them his sole consignees in *England*, and not to carry on any business there himself. He did, in fact, authorize the *Apollinaris Company* to register the labels as theirs, and he had full power to do so. The registration of the labels by them was in accordance with the course suggested by the Court of Appeal in *Goodfellow* v. *Prince* (4). *Saxlehner* could have registered the marks as his, and he could allow the *Apollinaris Company* to do this instead of doing it himself.

As to the *Apollinaris* mark No. 4122. *Kreuzberg* and the German *Gesellschaft*, who own the *Apollinaris* spring, consented to the registration by the *Apollinaris Company*, and the registration is justified by that consent. *Kreuzberg* and the *Gesellschaft*

(1) 32 Ch. D. 247.
(2) 54 L. J. (Ch.) 1003.
(3) 59 L. J. (Ch.) 763.
(4) 35 Ch. D. 9.

were the predecessors in business of the *Apollinaris Company.* The mark was branded on the corks for them and under their directions. The fact that there had been user by the owners of the spring is not material. A device may be registered without any previous use: *In re Hudson's Trade-marks* (1), and there was no provision for any disclaimer in the Act of 1875 (1). Moreover, the words "*Apollinaris Brunnen*" were never common to the trade. We agree that there cannot be a trade-mark in gross, and that an assignment of a trade-mark must be in respect of user for particular goods; also that a trade-mark must be free from misrepresentation. But it was not necessary, previous to the passing of the *Trade Marks Registration Act,* 1875, for a man to assign his business and goodwill at the same time as he assigned his trade-mark: *Leather Cloth Company* v. *American Leather Cloth Company* (2); *Bury* v. *Bedford* (3); *Cotton* v. *Gillard* (4). *Kreuzberg* and the *Gesellschaft* were *bonâ fide* the *Apollinaris Company's* predecessors in business.

As to the *Friedrichshall* label, No. 45,096.

The 74th section of the Act of 1883 only requires disclaimer of words "common to the trade," which are added to a trade-mark. The word *Friedrichshall* has never been common to the trade: *In re Leonard & Ellis's Trade-mark* (5), and the word *Friedrichshall* is not added to a trade-mark, but is part of the entire label, which is a "distinctive label," and, therefore, a registrable trade-mark within sect. 64 of the Act. The label has on it the name of the *Apollinaris Company* as sole exporters, and is therefore not within *In re Wood's Trade-mark* (6). The statement that they are the sole exporters is correct, for it means that the company are the sole exporters from *England,* not from *Germany.* The words "trade mark" under the red disc only imply that that device is registered as well as the whole label. The same occurred in *In re Hudson's Trade-marks;* but the label was not rejected on that ground. The label is not deceptive.

As to the *Friedrichshall* mark No. 48,933. This was at the date of registration a distinctive device which had not been

(1) 32 Ch. D. 311; 3 Rep. Pat. Cas. 155.
(2) 4 D. J. & S. 137.
(3) 4 D. J. & S. 352.
(4) 44 L. J. (Ch.) 90.
(5) 26 Ch. D. 288.
(6) 32 Ch. D. 247.

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previously used anywhere, and the *Apollinaris Company* were entitled to register it, especially with the consent of *Oppel & Company*, on whose goods it was to be used.

Warmington, Q.C., and *Grosvenor Woods*, watched the appeal as to the *Hunyadi Janos* marks on behalf of *Saxlehner*.

Sir *R. G. Webster*, A.G., in reply:—

The question in all these cases is not whether the owners of the several springs could have registered the marks, but whether at the dates of the respective registrations the *Apollinaris Company* were entitled to register the several marks as theirs. This they were not entitled to do, with or without the consent of the owners of the springs. They had no interest in the whole of the waters from the springs, and they could not register marks applied to the whole of the waters because they were consignees of some of such water. The words on the labels were, "open to the trade": *Burland* v. *Broxburn Oil Company* (1). "Common to the trade" in sect. 74 is a different expression from "in common use" in sect. 64, which shews that something different was meant. The *Apollinaris Company* had, under sect. 62, to claim to be the proprietors of the marks, but this they could not properly or truthfully claim, for the marks were really the property of the spring owners. In *Goodfellow* v. *Prince* (2), the suggestion that the importers could register the marks was immediately followed by the corrected suggestion that the foreign producer could do so. The trade-marks could not be assigned, even before the Act of 1875, otherwise than together with the goodwill: *Leather Cloth Company* v. *American Leather Cloth Company* (3). Though a mark may be registered without previous user: *In re Hudson* (4), it cannot be registered when an intention to use is distinctly negatived, and the registration of No. 48,933 was clearly opposed to the intention of this Act, which is that marks are to be registered with the purpose of using: sect. 70 of the Act of 1883; *Edwards* v. *Dennis* (5).

The Court reserved its judgment.

(1) 42 Ch. D. 274; 6 Rep. Pat. Cas. 482.
(2) 35 Ch. D. 9.
(3) 11 H. L. C. 523.
(4) 32 Ch. D. 311; 3 Rep. Pat. Cas. 155.
(5) 30 Ch. D. 454.

The *Apollinaris Company's* appeals were then heard.

John Cutler (with him, *Rigby*, Q.C., and *Neville*, Q.C.), for the *Apollinaris Company* :—

As to the word "*Apollinaris*" (No. 45,591). This is capable of being registered under sect. 64 of the Act of 1883, and the same section as amended by the Act of 1888.

Sebastian (with him, Sir *R. E. Webster*, A.G., *Aston*, Q.C., and *F. M. Abrahams*), for the *Vichy Company*, was not called on.

LINDLEY, L.J. :—

It is impossible to say that this is a fancy word, or that it is not a geographical word. The appeal must be dismissed with costs.

[The appeals as to the words "*Friedrichshall*" (No. 45,589), and "*Hunyadi Janos*" (No. 45,590) were also dismissed with costs on the same ground.]

John Cutler (with him, the same counsel as before), for the *Apollinaris Company* :—

As to the *Apollinaris* marks, Nos. 44,218, 44,219, 44,220, called "the Malay labels." These are distinctive labels and registrable as a whole. No disclaimer of the word "*Apollinaris*" can be required for the same reasons as have been already urged.

As to the *Friedrichshall* label, No. 49,535. This label is a distinctive label, not used prior to the registration, and is properly claimed by the *Apollinaris Company* for the same reasons as the device No. 48,933 which is used on this label.

Sebastian (with him, the same counsel as before), for the *Vichy Company* :—

As to Nos. 44,218, 44,219, 44,220, it is clearly stated in the affidavit of Mr. *Prince*, the representative of the *Apollinaris Company*, that the upper half of these labels consists of an old label used by *Kreuzberg's* successors in business. The *German Gesellschaft* and the *Apollinaris Company* are not entitled to register this as part of the Malay label. The same thing applies

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to the anchor brand, which appears four times on the labels. There is no disclaimer of the word "*Apollinaris*," as there should have been, and even if the *Apollinaris Company* wished to disclaim this now, it is too late, for the disclaimer must be in the application: *In re Goodall's Trade-mark* (1); *In re Meeus' Application* (2).

[LINDLEY, L.J.:—As the *Apollinaris Company* refuse to disclaim, that point does not arise here.]

The correct translation of the Malay inscription shews that this label represents the German *Gesellschaft* to be the owner, and the case is within *In re Wood's Trade-mark* (3).

As to No. 49,535, the same reasons apply as have been urged against No. 48,933, with the additional circumstance that the name of *Oppel & Company*, the spring owners, is so placed in the label as to bring the case within *In re Wood's Trade-mark*.

J. Cutler, in reply.

1890. Dec. 18. LINDLEY, L.J.:—

The judgments which will be delivered by Lord Justice *Fry* in this case have been carefully considered by all of us, and will be the judgments of the Court (4).

FRY, L.J.:—

The first judgment which I am about to deliver relates to the application with regard to the three marks, 9026, 6356, and 6357, of the *Hunyadi Janos* water, and it is an application to remove those marks from the register. The mark No. 9026 is the simple name "*Hunyadi Janos*." The marks 6356 and 6357 are marks which bear the name of "*Hunyadi Janos*," and are also distinguished by the portrait of the General whose name the water bears. Now, with regard to this application two questions arise. The first is, whether the applicants, the *Vichy Company*, are persons aggrieved within the meaning of the 5th section of the Statute of 1875, which governs the law with

(1) 42 Ch. D. 566.
(2) [1891] 1 Ch. 41; 8 Rep. Pat. Cas. 25.
(3) 32 Ch. D. 247.
(4) The Court was composed of *Lindley*, *Bowen*, and *Fry*, L.JJ.

regard to these trade-marks; and, if it be found that they are persons aggrieved, the second question arises, namely, whether the marks ought to be removed from the register. The facts which are relevant to the first question, as we find them, are shortly as follows: That this spring was the property of a certain Mr. *Saxlehner*, and that before the year 1876 sales were made to a large extent by *Saxlehner* to various persons, including, amongst others, the firm of *Ingram & Royle*, who were the predecessors in business of the *Vichy Company*. On the 14th of February, 1876, a contract was entered into between *Saxlehner* and the *Apollinaris Company*, by which the sole right of selling the water in *England* and elsewhere, except on the Continent of *Europe*, was granted to the *Apollinaris Company* for ten years, and *Saxlehner* undertook to refuse to execute orders for *England*. The period of that contract was subsequently extended to the year 1900. After the contract had been entered into, *Ingram & Royle* continued to deal in the *Hunyadi Janos* waters, purchasing them from the *Apollinaris Company*. In June and September of 1876, and, therefore, shortly after entering into this contract for the supply of the waters to the *Apollinaris Company*, the three marks in question were registered in *England* by that company. In the year 1885, *Ingram & Royle* sold their business to the *Vichy Company*, and about the same time, or shortly afterwards, the *Apollinaris Company* refused to supply the *Vichy Company* or *Ingram & Royle* with the waters in which that firm had previously dealt. Thereupon, *Ingram & Royle* obtained some cases of the water from English dealers; but that course of business was stopped by the intervention of the *Apollinaris Company*, relying upon their trade-marks, and by their requiring, as a condition of their sale of the water to dealers in it, that they would enter into an undertaking not to sell this water to *Ingram & Royle*. Further than that, it appears that certain small parcels of water reached *England*. We have an account of certain imports into *Hull*, and we have an account of certain cases which were sold to two persons, one of the name of *Thompson*, and the other of the name of *Smith*, and in all of those cases that course of business again was stopped by the intervention of the *Apollinaris Company*. Whether the imports into *Hull* and the sales

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to *Thompson* and *Smith* represent the same transactions or no is a matter which is not clear upon the evidence, and which is not really material to the decision of this case. With regard to an article known as *Artificial Hunyadi Janos*, that is to say, an artificial water made in imitation of the natural *Hunyadi Janos*, and the lozenges which were made from the salts of the water, it appears that there was a manufacture and sale in this country. That manufacture and sale were not very large, but those again were stopped by the intervention of the *Apollinaris Company*, and we have evidence, at least in two cases, of that having occurred—the cases of *Condy* and *Struve*. We find, further, that the dealing in the natural and artificial *Hunyadi Janos* waters was within the business of the *Vichy Company*, who were general dealers in natural and artificial waters, and that as a fact the *Vichy Company* did desire to deal in *England* certainly in the natural *Hunyadi Janos* waters. From the actual evidence of small parcels of this water being brought into this country till stopped by the *Apollinaris Company*, and from the general course of trade, we conclude that there was a possibility of getting the water in small quantities, and that that supply might, and very probably would, have increased if it had not been checked and stopped by the *Apollinaris Company* by threats of actions based on the trade-marks. There was, in short, a rivulet which, unimpeded, might have grown into an important stream. On any bottles which the *Vichy Company* might have obtained in this way they would, in our opinion, have been entitled to use the labels which signified that the bottles contained *Hunyadi Janos* water, and that they had come from Mr. *Saxlehner's* spring. But the registration of the trade-mark, registered in the name of the *Apollinaris Company*, would have prevented them from exercising this right. Are the *Vichy Company* persons aggrieved? Now we approach this question on the assumption, which is necessary of course to answer this question, that the trade-mark was wrongly on the register, and further, with these two observations: in the first place, that the question is merely one of *locus standi*; and in the second, that the words "person aggrieved" appear to us to have been introduced into the statute to prevent the action of common informers or of persons interfering from

merely sentimental motives, but that they must not be so read as to make evidence of great and serious damage a condition precedent to the right to apply. Further, we are of opinion that whenever one trader, by means of his wrongly registered trade-mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an "aggrieved person." Again, if the effect produced, or likely to be produced, by the wrongful trade-mark, is not the exclusion, but the hampering of a rival trader, that rival trader, again, is in our opinion a person aggrieved. A man in the same trade as the one who has wrongfully registered a trade-mark and who desires to deal in the article in question is *primâ facie* an "aggrieved person." This may be rebutted by shewing that, by reason of some circumstances entirely independent of the trade-mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark, and here that burden has not been discharged. It is impossible to say how much of the difficulty under which the Appellants have laboured has been due to the trade-mark, and how much to other circumstances. We, therefore, conclude that the *Vichy Company* are aggrieved persons.

Now, with regard to the merits of the three trade-marks, it is obvious that they must be treated separately. As to mark 9026, that case is abandoned on its merits by the Respondents, and therefore that mark fails. As to the next two marks, 6356 and 6357, they may be taken together, because the same considerations apply to the two. With regard to these marks, the Attorney-General made several points. These labels, we conclude, and it is not, in fact, in dispute, were *Saxlehner's*, and, according to the contention of the *Apollinaris Company*, were registered by them with *Saxlehner's* authority. The Attorney-General contended that there was no evidence of authority to register these marks in the name of the *Apollinaris Company*, and that the burden of proving this was on the *Apollinaris Company*. Without determining the accuracy of this contention, we proceed to consider the next contention which he raised, which we think is tenable; for if

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Saxlehner did give his consent to this registration, that did not, in our opinion, justify putting his mark on the register. In the first place, the label must be a distinctive label under sect. 10 of the Statute of 1875; that is, a label distinguishing the goods of the person claiming it from all others; whereas, in fact, this mark did not distinguish the bottles sold by the *Apollinaris Company* from any others of *Saxlehner's*, but, on the contrary, represented them as *Saxlehner's* bottles. That appears on the face of the mark. And again, the *Apollinaris Company* were not persons entitled to the exclusive use of it, either under the statute or otherwise at law. They had not used it, and so had no right at law. A person who puts another's trade-mark on the register cannot be a person entitled under the Act. We are not concerned here with a case in which an importer may use the mark of a manufacturer with an addition indicative of the goods having been imported by him; but the mark of a manufacturer pure and simple cannot rightly be assumed by an importer from that manufacturer, or by a person who buys from that manufacturer, unless indeed where all the goods of the manufacturer go to that importer or that dealer. If they did not, other goods of the manufacturer might reach the hands of other dealers, who might justly affix to them the manufacturer's mark. Now for this purpose the owner of a natural source of an article which nature manufactures is in the same position as a manufacturer by the hands of his workpeople. If *Saxlehner's* assent would justify the registration, it would follow that a manufacturer in *Paris* using a trade-mark well known in *England* could allow *A.* to register it as his trade-mark, and thereby prevent *B.* and *C.*, who bought from the *Paris* maker, from selling in *England*. That is what has been attempted in the present case as regards the instances of *Thompson* and *Smith*. For these reasons it appears to us that both the marks 6356 and 6357 must be removed. A further point was urged upon us with regard to the mark 6357, which was based upon the words contained in it, that "Imitations of this water will be prosecuted." We are inclined to hold that that means all imitations of the water, whether fraudulent or not, and that it is addressed, therefore, to artificial *Hunyadi Janos* waters, which might have been legiti-

mately made and legitimately sold under that name, provided it was made clear they were artificial waters, and therefore that the mark is calculated to deceive. That is the inclination of our opinion on that point, which becomes unnecessary in consequence of the view we have taken upon the earlier part of the case. It follows, therefore, that with regard to all those three marks the motion must be allowed, and of course with costs of the motion, to be paid by the Respondents.

I come next to the questions which are raised with regard to the marks 2076 and 4122, which are the marks relating to the *Apollinaris* spring itself. The first of those was registered on the 24th of May, 1876, and is simply the name "*Apollinaris.*" The second, 4122, was registered on the 14th of June in the same year, and is a trade-mark consisting of the word "*Apollinaris-Brunnen,*" between two circles and an anchor in the centre space left. With regard to these two marks, again the same classes of questions arise, and the first question is, Are the *Vichy Company* aggrieved persons? The facts which are relevant to this inquiry are shortly these. The *Apollinaris* spring is one which has been long known, and the water has been in the market for many years. In the year 1852 a certain Mr. *Kreuzberg* was the owner of it, and in the year 1873 he contracted with the *Apollinaris Company* to supply them with this water, and granted to them the exclusive sale in Great Britain. In the same year he died, and his representative sold his interest in the spring to an Actien Gesellschaft, or joint stock company in Germany, and in the year 1876 the registration took place of the two marks which are now in controversy. In the year 1881, that is four or five years after the registration, another contract was entered into between the *Apollinaris Company* and the *Actien Gesellschaft,* under which the *Apollinaris Company* obtained the right to all the waters produced by the spring for a period of fifty years, determinable on certain contingencies, and in 1885, as we already know, the *Vichy Company* bought *Ingram & Royle's* trade, and again, in the same year, as in the case of the *Hunyadi Janos* waters, shortly after that event the *Apollinaris Company* refused to supply the *Vichy Company* with these waters. Now, as regards the question of rival trading, the case stands differently from that

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of the *Hunyadi Janos*; for here all the water from the spring comes into the hands of the *Apollinaris Company*, and it may be that they could not object to the use, by any person purchasing this water, of the marks in question. In this case the importer has become the master of the whole produce, and it seems to us, therefore, doubtful whether the *Vichy Company* were aggrieved after the monopoly contract of 1881; but in the interval between the year 1876, when the mark was registered, and the year 1881, when that contract was entered into, they appear to us to have been aggrieved as rival traders. There is a further doubt in our minds whether the interference with the trade in the artificial waters, which is shewn in this case in two instances—with regard to *Norrish* in one, that having been before the registration, and *Hochheimer* in 1876—can be traced to the trade-marks; but that point appears to us not necessary further to discuss, because, in our judgment, the *Vichy Company* have a real head of grievance and are aggrieved persons for this reason. On the 4th of April, 1885, the *Apollinaris Company* applied to register three marks for "mineral and aërated waters," which are the marks numbered 44,218, 44,219, and 44,220. They are what have been known in the course of this discussion as the "Malay marks." That application was opposed by the *Vichy Company*, and in March of the following year, in answer to that opposition, Mr. *Prince*, on behalf of the *Apollinaris Company*, swore an affidavit and set out the two marks now in question, 2076 and 4122, and swore that the *Apollinaris Company* were entitled to the exclusive use of these marks. In other words, the *Apollinaris Company* alleged that they were the owners of these marks, and asked the Court thence to infer that they had a right to have other marks registered, to which the *Vichy Company* objected. On this ground the *Vichy Company* say that they are aggrieved. To which the *Apollinaris Company* reply, "Our contention was idle, and it did not follow because we had these marks therefore we were entitled to the others," and they have urged that a bad argument is an injury to no one. In our opinion, when one trader uses the fact of registration as any part of his case against another trader in any legal proceedings, that second trader is aggrieved, and this is

not the less so because that trader may have other means of defending himself. If the owner of the registered trade-mark says to a defendant in a litigation, "I am the owner of this registered trade-mark, and, therefore, you are doing me a wrong," the person attacked ought to be at liberty to reply two things: first, "You ought not to be on the register," and, secondly, "Even if you ought, I have done you no wrong." The completeness of the second line of defence ought not to preclude the attacked person from availing himself of the first. If I am assailed with the conclusion of a syllogism I am at liberty, both in logic and in law, to defend myself by denying both or either of the two propositions which are alleged in support of the conclusion, and I am aggrieved if I am unjustly deprived of that right. This liberty of defence is a matter of great importance to a litigant. Suppose a person be sued for an infringement of the trade-mark 2076, he will have a short and immediate answer to the action if he can attack the trade-mark, for it is admitted that the registration cannot be justified on the merits. The inquiry whether, if the registration stands, he has infringed the mark might be a long and expensive one, to which, in our opinion, he ought not to be driven, even though he may be able to succeed upon it. The practical conclusion of this view is, we think, a sound one. It will stop the practice of which we have seen instances in this case of a trader registering his mark without justification, using it as a means to intimidate or coerce other traders, and then at the bar alleging that the threat was idle and the persons against whom it was used were not aggrieved thereby. For these reasons we conclude that the *Vichy Company* are "aggrieved persons" within the meaning of the Act.

We come then to discuss the merits. With regard to No. 2076, as I have already stated, it has been abandoned on the merits by the Respondents. With regard to the mark 4122, which, it will be recollected, is the word "*Apollinaris-Brunnen*" with the anchor, that mark has been used in several ways by *Kreuzberg* and the *Actien Gesellschaft*, who are his successors, from the year 1868 to 1876. It has been used on the corks alone, it has been used on stone bottles with the name and address of *Kreuzberg*, and it appears to have been used in other ways—on

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glass bottles, capsules, and a certain pamphlet in a way that it is not necessary to describe further with exactitude. To this mark numerous objections have been urged. One objection is based upon the allegation, made by the *Apollinaris Company* when they applied to register, that it had been used two years before the 21st of March, 1876; whereas, in fact, it never was used by the *Apollinaris Company*, but was used by *Kreuzberg*. At the date of the registration the *Apollinaris Company* had no monopoly of the spring and no right to prevent any person who purchased from *Kreuzberg* or the *Actien Gesellschaft* from using *Kreuzberg's* trade-marks. If the registration had been by *Kreuzberg* it would have been right; but the registration by the importer from *Kreuzberg* was wrong. Again, if the mark registered had been one which indicated the importer it might have been maintained; but an importer has no right to appropriate to himself a mark which, as in this case, both by user and express statement, on its face asserts itself to be a mark of the producer or of the owner of the place of origin, because at the time of the registration the mark was an old one, and of course could not be registered as a new one; it was an old one of *Kreuzberg's*, and, therefore, could not be registered as an old one of the *Apollinaris Company*. It was the mark of the producer, and could not be registered as the trade-mark of the importer, who had no right to the whole produce of the spring. The case, in our opinion, therefore, comes within the fifth section of the Act of 1875, and we find that the *Apollinaris Company* were not at the time of registration entitled to the exclusive use of the mark. In the next place, it was argued that the registration was obtained upon a statement made in Form A, alleging that this mark was branded by the *Apollinaris Company* on the corks. We do not regard this as an immaterial misrepresentation, for it suggests a possession of the spring and consequent right to an exclusive mark which was not justified by the facts. It appears to us to be made probably with a view to support the *Apollinaris Company's* claim to be the sole importers. On behalf of the *Apollinaris Company*, an argument was addressed to us to this effect, that as they had in the year 1881 become the sole owners of the produce of the spring, they could now get these marks on the register, and that

we ought not to remove marks which, as soon as we have taken off, can be put on again. But, even assuming that the Respondents are *primâ facie* entitled now to be placed on the register, as to which we say nothing, we are of opinion that the course suggested is rendered impossible by the statutory provision for advertisements. To allow a mark which ought not to have been on the register to remain on by reason of some intervening event would be to preclude the public from challenging the new title of the applicant for registration. For the reasons which I have given, we, therefore, allow the appeal with regard to these two trade-marks, and make an order for the rectification, with costs to be paid by the Respondents.

I now come to deal with the applications to remove from the register the trade-marks 45,096, 45,097, and 48,933, those marks relating, as we know, to the *Friedrichshall* waters. The first one, 45,096, is the label having the word "*Friedrichshall*" very large upon it, and also a scarlet disc marked with the words "trade mark" underneath. The second, is one to register the word "*Friedrichshall*"; and the third trade-mark which is in question with regard to *Friedrichshall*, which is numbered 48,933, is the large letter "*F*" in old German form, transfixed by an arrow. Those marks were registered in the year 1885, and therefore the questions to be determined in this application are to be governed by the Act of 1883. Now, again, the first question is whether the *Vichy Company* are aggrieved persons. The language of the two statutes, those of 1875 and 1883, appears to us to be entirely the same upon this question, and therefore the question really is the same under the two statutes. The short facts which are necessary to be stated with regard to this part of the case are these: that in the year 1763 this spring was discovered, and that during the whole period now in question a certain Mr. *Oppel* was the owner of the spring, and a firm of *Charles Oppel & Co.* worked it; that the water had been known in the market for years; it had been largely dealt in by *Ingram & Royle*, who are the predecessors in title of the *Vichy Company*; and that there were artificial *Friedrichshall* waters and *Friedrichshall* salts, both known in the market, though not to any very large extent. Then, as I have already mentioned, in the year 1885 the *Vichy Company*

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purchased *Ingram & Royle's* business; and on the 9th of May of that year *Oppel* entered into a contract with the *Apollinaris Company* which gave to them the exclusive right, in *Great Britain* and elsewhere, of purchasing and dealing in this water so far as that right could be given by *Oppel*. In pursuance of, and to give effect to that contract, the practice seems to have been adopted by *Oppel* of placing upon the bottles which were sold, either here or on the Continent, a notice prohibiting so far as he could the export of the water from the Continent. Then, down to the year 1885, the *Vichy Company* had bought from *Oppel* direct. In that year the sale was stopped, except as to purchases abroad of bottles which were used abroad by the *Vichy Company*. and except that up to the year 1885 the *Vichy Company* bought from the stocks of the holders in *England*, and resold in *England* to some extent; and it is also evident there had been a certain sale of artificial *Friedrichshall* water. Now the cases of the *Apollinaris Company* v. *Snook* (1), and the *Apollinaris Company* v. *Herrfeldt* (2), shew the way in which the presence of these marks was used by the *Apollinaris Company* to hamper the trade in these waters; and without going further over that ground, we conclude in this case the *Vichy Company* were aggrieved as rival traders. But, further than that, there are facts which give rise in our opinion to a similar ground of grievance to that which we have already mentioned in the case of the *Apollinaris* water, for, in an application to register a trade-mark relating to the *Friedrichshall* salts, the *Vichy Company* were opponents, and they were again met by the *Apollinaris Company* setting up the two marks 45,096 and 45,097, and in an application for another label as to waters, which was opposed by the *Vichy Company*, they were again met by the *Apollinaris Company* setting up the third mark, 48,933, against them as part of their title. On both those grounds, therefore, we hold that the *Vichy Company* are aggrieved persons.

I then come to the merits. With regard to No. 45,097, it is admitted the mark cannot remain on; and I cannot help observing that it is the third of the marks we are dealing with in these applications, the registration of which, it is admitted, is so wrong

(1) 7 Rep. Pat. Cas. 474. (2) 4 Rep. Pat. Cas. 478.

on the merits as to be incapable of being argued. With regard to the mark 45,096, several objections were raised by the Attorney-General. One was that the mark was calculated to mislead, inasmuch as the whole label is registered as a trade-mark, and yet contains the assertion that the red disc, which is the most conspicuous part of the whole label, is "trade mark"—not saying "a trade-mark," not saying part of "the trade-mark"—but an assertion pointing to the conclusion that it, and it alone, is "the trade-mark," and therefore, that the label, as a whole, is not the trade-mark. Such would have been the impression produced (I am speaking for myself) on my own mind had I approached the reading of that label unbiased by what I have learned while sitting in this seat, and such we think is the true result in this case. An owner of a registered trade-mark may put it on a registered label, but not so as to mislead a reader of that label, and induce him to believe the only thing registered is the distinctive mark. With regard to this point, it was contended before us that our conclusion is inconsistent with the decision in *Hudson's Case*, where undoubtedly the point, or a similar point, might have been raised. That case is reported in two places (1). In the last report the label itself will be found. But the point, though probably open, was not really in controversy, and not really raised. The fact of the arm and dolly being described on the label as trade-mark was referred to in the judgment, but only in connection with the main argument, which turned on the use of the words "*Carbolic Acid Soap Powder*." We do not feel, therefore, that there is anything in that decision which binds us in the present case. As my Brother, Lord Justice *Bowen*, reminds me, the very absence of argument—learned counsel in that case not arguing that point in fact—prevented our deciding it, and it might be an indication of their view that in that case the words "trade mark" would not be deceptive. Another question might probably be raised with reference to the word "*Friedrichshall*," whether it had been in common use, and was prominently set forth in this label. Did it or did it not require disclaimer, or raise any objection under the 73rd section of the statute? It was not a word in our opinion additional to the trade-mark within the meaning of sect. 74, but

(1) 32 Ch. D. 311; 3 Rep. Pat. Cas. 155.

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the question would seem to be one worthy of consideration, whether that was or was not one which was disentitled to protection within the meaning of those words as used in the 73rd section of the Act. Upon that point we express no opinion, and only refer to it to shew that it has not escaped our attention. With regard, then, to the mark 48,933, which is the German letter "*F*" impaled by the arrow, we find that that is the material part of a label which was devised and used by *Oppel* on the Continent, that this label was registered by him on the Continent in the year 1885, and that in November of the same year an application was made to register this "*F*" in this country. Now, it was admitted that this had never been separately used in this country. There was no evidence of any user of this label or any intention to use it in this country, and it is clear to us, and was, in fact, admitted, that there was no intention to use the mark in this country, but that it was intended to support and give effect to the monopoly contract, by stopping persons importing into *England* water sold in *Germany* with the marks which had been registered by *Oppel* in *Germany*. The argument was put very high by the Respondents' counsel. They maintained that a person, without ever using, having used, or intending to use, or having any connection with a trade in which there might be used a label or other trade-mark, may register that and preclude all other persons from using it, without ever using it himself or intending to use it. That argument appears to us to be entirely untenable. It was further argued that the contract entered into between *Oppel* and the *Apollinaris Company* was one of which every purchaser abroad must have notice, and every person who bought to import into this country must also have notice, and that no person who took with notice could lawfully import into this country. It is difficult, perhaps impossible, to believe that this argument can prevail. If it can, a fetter hitherto unthought of will be placed on the commerce of this country. But, again, if it ever can prevail, it must do so by force of the contract and notice, and no one, in our opinion, can use the *Trade Marks Act* for the purpose of supporting such a cause of action. The object of that statute is to protect trade-marks—that is, marks placed on goods to indicate their origin or their selection,

or their importation, or some other trade qualification, and thereby to give information with regard to those goods to all persons trading in them. They are marks under which the trader trades. It may well be that in the case of new marks the intention to use as a trade-mark may be presumed; but when it is apparent, as it is here, by the evidence and the admissions at the Bar, that there is no such intention, but that the registration is directed to a different end, then the entry has, within the meaning of sect. 90, been made without sufficient cause, and ought to be expunged. For these reasons we allow the appeal in the marks which I have been last dealing with, with costs to be paid by the Respondents. I have now dealt with all the applications to rectify the Register of Trade Marks.

The next application relates to three marks, 44,218, 44,219, and 44,220. Those are the marks which have the Malay inscription. Mr. Justice *Kekewich* refused registration on the ground that the word "*Apollinaris-Brunnen*" was a common term, and was not disclaimed, and that there was a refusal at the Bar to disclaim. Amongst the objections which were urged before us, and which we think ought to succeed, is this, that the upper part of the mark is distinctly *Kreuzberg's*; that the triangle or diamond (for it assumed different forms in the three marks) has written under it in each case the words "trade mark." We think that the mark has too great a tendency to deceive to induce us to reverse the decision of the learned Judge. We therefore dismiss this appeal with costs.

With regard to the mark 45,935, which is a label bearing conspicuously the letter "*F*" in German characters and the arrow transfixing it, this was really *Oppel's* mark, and for the reasons we have given we do not think the importer ought to be at liberty to register the pure and simple mark of the manufacturer or owner of the place of origin. We therefore dismiss the appeal with costs.

The next three applications on the list, dealing with marks 45,589, 45,590, and 45,591, were dealt with by us when we heard the applications, and were dismissed with costs.

The last application is with regard to three marks, 6356, 6357, and 9026. That was an application with leave in respect of costs.

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In regard to that, we merely say that in our judgment nothing has been shewn to induce us to interfere with the decision of the learned Judge with regard to costs, and the appeal must be dismissed with costs.

The Attorney-General then asked that the costs might be on the higher scale, and might include the shorthand writer's notes of the proceedings before Mr. Justice *Kekewich*; but this application was refused.

Solicitors for the *Vichy Company*: *Michael Abrahams, Sons & Co.*

Solicitors for the *Apollinaris Company*: *Janson, Cobb, Pearson & Co.*

Solicitors for *Saxlehner*: *G. L. P. Eyre & Co.*

M. W.

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In re SLEVIN.
SLEVIN *v.* HEPBURN.

[1890 S. 568.]

Will—Construction—Charitable Gift—Particular Charity—Lapse—Cy-près.

A charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid, does not fail for the benefit of the residuary legatee, as in the ordinary case of a lapse through failure of the object in the testator's lifetime: the property in the legacy falls to be administered by the Crown and will ordinarily be applied for charitable purposes.

A testator gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies to various institutions, churches, and bodies, using the introductory words, "I bequeath the following charitable legacies"; and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the testator's death, but was discontinued shortly afterwards, and before his assets were administered:—

Held (reversing *Stirling*, J.), that on the death of the testator the legacy became the property of the orphanage; and that, on the orphanage ceasing to exist, the property in the legacy became applicable by the Crown for charitable purposes.

The doctrine of lapse as applicable to a legacy to a charitable object in existence at the death of the testator, but subsequently failing, discussed. *Clark* v. *Taylor* (1) and *Hayter* v. *Trego* (2) considered.

THIS was an appeal by the Attorney-General from the decision of Mr. Justice *Stirling* (3).

Ingle Joyce, for the Attorney-General:—

Mr. Justice *Stirling* decided as he did in deference to *Clark* v. *Taylor* (4). There must be some inaccuracy in that report, for the headnote and the facts in the body of the report do not agree, and *Hayter* v. *Trego* which was not cited there, is directly in point the other way. *Attorney-General* v. *Fraunces* (5) is also in my favour.

Welby King, for the residuary legatees:—

I submit that the case is covered by *Clark* v. *Taylor*.

[LINDLEY, L.J.:—I think it is, if *Clark* v. *Taylor* is right; but I do not see on what theory the executors can get the legacy unless under the doctrine of a resulting trust.]

[KAY, L.J.:—In *Clark* v. *Taylor* Vice-Chancellor *Kindersley* seems to have thought the case like that of an institution which failed in the lifetime of the testator; but where the charity, the legatee, is in existence at the death of the testator, and has received, or might have received the legacy, does not the legacy by that very fact become impressed with charity which the residuary legatee cannot get rid of?]

There is a distinction between a public charity and a private charitable institution of this kind. In the case of a public charity any legacy must go to increase the funds of the institution; but in the case of a private charity it need not necessarily go to increase the funds, for it may go to assist the person who is carrying on the institution, and that person may, as in the present case, give a proper discharge for it. No doubt, where there is a gift to a public institution which fails, the legacy

(1) 1 Drew. 642; 1 W. R. 476.
(2) 5 Russ. 113.
(3) [1891] 1 Ch. 373.
(4) 1 Drew. 642.
(5) W. N. (1866), p. 280.

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should be applied *cy-près*; but where the testator intends to benefit a private institution which fails, the legacy fails.

[KAY, L.J.:—If a distinction is to be made between a public and a private charity, this would follow—that if the private charity spent the whole of the legacy and failed, the residuary legatee would have a right of action to refund.]

[LINDLEY, L.J.:—There certainly appears to have been some oversight in *Clark* v. *Taylor* (1).]

Vice-Chancellor *Stuart*, in *Russell* v. *Kellett* (2), took the same view as Vice-Chancellor *Kindersley* in *Clark* v. *Taylor*; and the distinction between a public and a private charity has been pointed out in many cases, as, for example, in *Fisk* v. *Attorney-General* (3).

[KAY, L.J.:—I quite agree, where the charity fails in the testator's lifetime, as was the case in *Fisk* v. *Attorney-General*.]

Moreover, *Clark* v. *Taylor* has got into all the text-books: *Jarman* on Wills (4); *Theobald* on Wills (5); *Tudor's* Charitable Trusts (6). In *Attorney-General* v. *Fraunces* (7), the circumstances were peculiar, and the money was in Court for the benefit of the charity. *Hayter* v. *Trego* (8) was a case of a public, not a private, charity. There, even if the charity had failed in the lifetime of the testator, application of the fund *cy-près* would have been directed.

[LINDLEY, L.J.:—You want to extend the doctrine of lapse to something that has ceased, not in the testator's lifetime, but after his death.]

Clark v. *Taylor* and *Russell* v. *Kellett* have stood for so many years that they ought not now to be disturbed, and I therefore ask the Court to hold that this legacy must be treated as having lapsed.

R. F. Norton, for the executors.

(1) 1 Drew. 642.
(2) 3 Sm. & Giff. 264.
(3) Law Rep. 4 Eq. 521.
(4) 4th Ed. vol. i. p. 246.
(5) 3rd Ed. p. 277.
(6) 3rd Ed. pp. 40, 41.
(7) W. N. (1866), p. 280.
(8) 5 Russ. 113.

Ingle Joyce, in reply:—

[LINDLEY, L.J.:—What do you say as to *Russell* v. *Kellett*? (1)]

That was a peculiar case, and the will itself was peculiar. Vice-Chancellor *Stuart* relied strongly on the use of the word "legatee," and on the fact that there was an absence of a general charitable intent; and, moreover, the order was made with the consent of the Attorney-General. Here the will does shew a general charitable intent. Where property is once devoted to charity, it must, in case of failure of the primary object, be applied *cy-près*: that is the constant practice. The notion of the residuary legatee getting back the fund is groundless. The law is well settled by *Attorney-General* v. *Ironmongers' Company* (2); *In re Prison Charities* (3); *Attorney-General* v. *Hankey* (4); and other cases collected in *Tyssen* on Charitable Bequests (5). *Clark* v. *Taylor* (6) is badly reported, and cannot be relied upon.

[THE COURT referred to *Corbyn* v. *French* (7) and *Marsh* v. *Means* (8).]

1891. March 20. The judgment of the Court (*Lindley*, *Bowen*, and *Kay*, L.JJ.) was delivered by

KAY, L.J.:—

This case raises a question which seems only to have occurred in two instances in the books, namely, whether a charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid over, fails for the benefit of the residuary legatee, as in the case of a lapse.

Properly speaking, a lapse can only occur by failure of the object in the lifetime of the testator; but it is possible that a will might be so framed as that a subsequent failure of the object of the charitable gift might occasion a resulting trust for the benefit of the testator's estate. We have not been referred to any such case, nor have we found any.

(1) 3 Sm. & Giff. 264.
(2) 2 Beav. 313.
(3) Law Rep. 16 Eq. 129.
(4) Ibid. 140, n.
(5) Page 440.
(6) 1 Drew. 642; 1 W. R. 476.
(7) 4 Ves. 418.
(8) 5 W. R. 815; 3 Jur. (N.S.) 790.

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A surplus of charity funds arising from decay of the particular charity, or from increase in the value of the charity property beyond the requirements of the special object, has been treated as charity property to be administered *cy-près*. Lord *Eldon*, in *Attorney-General* v. *Mayor of Bristol* (1), states expressly that this is a settled rule in case of a surplus arising from an increase of the fund. *Attorney-General* v. *Ironmongers' Company* (2) decides the same point where the object fails after the bequest has taken effect: and see *Attorney-General* v. *Earl of Craven* (3); *Chamberlayne* v. *Brockett* (4); and *Mayor of Lyons* v. *Advocate-General of Bengal* (5).

In *Attorney-General* v. *Wilson* (6), a difference is suggested where the will shews an intention to create a resulting trust; as where the charitable purposes do not exhaust the whole income of the fund which is dealt with at the time of the disposition, but something is left undisposed of from the first.

This is not a case of that kind. It is a simple legacy of a sum of "£200 to the *Orphanage of St. Dominic's, Newcastle-on-Tyne.*" If it had been received, the whole might have been expended at once; and, even if not received, the amount might have been anticipated by borrowing from a banker, or otherwise, and charging this legacy with the amount so borrowed.

Lord Justice *Bowen* has some doubt as to the effect of the evidence; but Lord Justice *Lindley* and I think the case must be treated as the learned Judge has done, namely, that, upon the evidence, "the orphanage, though about to be discontinued at the beginning of the year 1883, had not ceased to exist at the time of the testator's death" (7).

The orphanage did come to an end before the legacy was paid over. In the case of a legacy to an individual, if he survived the testator it could not be argued that the legacy would fall into the residue. Even if the legatee died intestate and without next of kin, still the money was his, and the residuary legatee would have no right whatever against the Crown. So, if the

(1) 2 Jac. & W. 294, 313.
(2) 2 My. & K. 576.
(3) 21 Beav. 392.
(4) Law Rep. 8 Ch. 206.
(5) 1 App. Cas. 91.
(6) 3 My. & K. 362.
(7) [1891] 1 Ch. 377.

legatee were a corporation which was dissolved after the testator's death, the residuary legatee would have no claim.

Obviously it can make no difference that the legatee ceased to exist immediately after the death of the testator. The same law must be applicable whether it was a day, or month, or year, or, as might well happen, ten years after; the legacy not having been paid either from delay occasioned by the administration of the estate or owing to part of the estate not having been got in. The legacy became the property of the legatee upon the death of the testator, though he might not, for some reason, obtain the receipt of it till long after. When once it became the absolute property of the legatee, that is equivalent to saying that it must be provided for; and the residue is only what remains after making such provision. It does not for all purposes cease to be part of the testator's estate until the executors admit assets and appropriate and pay it over; but that is merely for their convenience and that of the estate. The rights as between the particular legatee and the residue are fixed at the testator's death.

These propositions are so obvious that it would seem impossible to dispute them without some authority to the contrary. Is there any such authority?

In the case of *Hayter* v. *Trego* (1) Sir *John Leach* had this very case to deal with. A testator gave a legacy of £500 to a voluntary society called the "*Plymouth and Devonshire Asylum for the reception of Female Penitents.*" He died in June, 1821, at which time the asylum was still in existence; but on the 29th of May, 1822, before the legacy was paid, the society was dissolved.

We have examined the record: it is plain from it that the contest was between the next of kin, there being no residuary gift, and the Attorney-General; and Sir *John Leach* decided the case in the only way which on principle seems to us to be possible, namely, that the fund must be applied for charitable purposes resembling that which had failed.

It is said, and perhaps with truth, that there was in that case a sufficient indication of a general charitable intention to justify the decision, even if there had been no such institution in

(1) 5 Russ. 113.

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existence at the testator's death; and reliance is placed on the more recent decision of Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1).

According to the report in *Drewry*, the bequest was of £50 to a female orphan school in *Greenwich*, patronized by Mrs. *Enderby*. The testator died in October, 1846 (which is in that report incorrectly printed "1840"), and the school was discontinued in November of the same year. In the *Weekly Reporter* it is stated that the school was discontinued about the same time that the testator died.

Neither in the arguments nor in the judgment was reliance placed upon the circumstance that the institution was actually in existence at the testator's death. In the judgment it was treated as a clear case of lapse—that is, as though there was no such institution at the testator's death; and the only matter dealt with by the Vice-Chancellor was the question whether, on that supposition, there was such a general intention of charity as to justify an administration *cy-près*. The Vice-Chancellor decided that there was not, and that the residuary legatees were entitled. *Hayter* v. *Trego* (2) was not referred to; the only cases cited were, *Cherry* v. *Mott* (3), and *Loscombe* v. *Wintringham* (4), in one of which the failure of the charity occurred in the testator's lifetime, and in the other what is equivalent—the legatee declined the bequest.

It was upon the authority of this decision of Vice-Chancellor *Kindersley*, that the learned Judge in the Court below chiefly rested his judgment, rather, as we gather from his language, against his own opinion. We cannot treat *Clark* v. *Taylor* as a decision which supports the view he has taken. It seems to us that all the Vice-Chancellor intended to decide was that, assuming the institution to have failed in the testator's lifetime, there was no such general purpose of charity as would warrant the distribution *cy-près*.

We have not found any case in which the supposed view of the Vice-Chancellor in *Clark* v. *Taylor* has been followed. In the text-books—*Tudor* on Charitable Trusts (5), *Jarman* on Wills (6)

(1) 1 Drew. 642; 1 W. R. 476.
(2) 5 Russ. 113.
(3) 1 My. & Cr. 123.
(4) 13 Beav. 87.
(5) 3rd Ed. p. 41.
(6) 4th Ed. vol. i. pp. 246, 247.

doubtfully, and *Theobald* on Wills (1), and also by Lord *Hatherley* in *Fisk* v. *Attorney-General* (2), and Vice-Chancellor *Stuart* in *Coldwell* v. *Holme* (3), it is treated as a case of lapse on the ground that the institution had come to an end in the testator's lifetime. If it decided that failure of the institution after the testator's death occasioned a lapse, or on any other ground entitled the residuary legatee to the legacy, we are of opinion that the decision should be overruled; but we do not believe that anything of the kind was intended.

In the present case we think that the Attorney-General must succeed, not on the ground that there is such a general charitable intention that the fund should be administered *cy-près* even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on its ceasing to exist its property falls to be administered by the Crown, who will apply it, according to custom, for some analogous purpose of charity: *Attorney-General* v. *Ironmongers' Co.* (4); *Wilson* v. *Barnes* (5); *Tyssen* on Charitable Bequests (6).

Solicitors: *Grundy, Izod, & Grundy,* agents for *W. Webb, Morpeth; Hare & Co.; Pattison, Wigg & Co.,* agents for *Richardson, Newcastle.*

(1) 3rd Ed. p. 277.
(2) Law Rep. 4 Eq. 521, 528.
(3) 2 Sm. & Giff. 31, 34.
(4) 2 My. & K. 576; 2 Beav. 313; Cr. & P. 208; 10 Cl. & F. 908.
(5) 38 Ch. D. 507.
(6) Page 440.

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[1888 A. 1164.]

Partnership—Partner engaging in another Business—Use of Name of Firm—Profits of the other Business claimed as Assets of the Partnership—Information gained as a Partner.

If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may obtain from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefit.

A member of a firm of shipbrokers styled "*H. C. & Co.*," assisted in the formation of a joint-stock company for building ships, and in so doing availed himself of information obtained as a member of the firm, and occasionally used the name and office paper of the firm in his correspondence on that subject. He received remuneration for his services in the formation of the company, and was made a director of the company, when formed, at a salary. He also threatened to engage in the separate business of a ship-owner under the style of "*H. C. & Co.*, ship-owning." The other partners brought an action to restrain him from using the name of the firm in a separate business, and claiming an account of his profits and salary in connection with the new company:—

Held (affirming the decision of *Kekewich*, J.), that the Defendant must be restrained from using the name of *H. C. & Co.*:

But, *held* (reversing the decision of *Kekewich*, J.), that as the business of the new company was beyond the scope of, and did not compete with, the partnership business, the Defendant was not bound to account for the benefit obtained by him in connection with the new company.

The use by the Defendant of the name and paper of *H. C. & Co.* in promoting the ship-building company was held not to be sufficient to shew that as between the Defendant and his partners ship-building was within the scope of the partnership business.

Dean v. *MacDowell* (1) explained and followed.

By articles of partnership, dated the 24th of June, 1874, *Horace A. Clarkson, Leon Benham,* and the Defendant *Henry Benham,* renewed and modified a partnership previously existing between them in the business of ship and insurance brokers,

(1) 8 Ch. D. 345.

commission agents, and owners of ships and shares of ships, for a period of twenty-one years. The business was to be carried on in the name of "*H. Clarkson & Co.*" *H. A. Clarkson* was to be entitled to the largest share of the business, and was not to be obliged to take an active part in carrying on the business. If any of the three partners should retire or die during the term the other partners might purchase his share, and it was provided that employés of the firm might be admitted as partners in the business, or in a limited branch thereof, but the control and management was to remain in the senior partners. Under the last-mentioned provision several persons were admitted from time to time as subordinate partners.

By fresh articles, dated the 28th of December, 1880, it was agreed that the business of ship-owning should be separated from the business of ship-insurance and ship-broking and the other business of the firm, and that the separate branches of the business should be carried on under the terms of the original partnership deed of 1874, for a period of five years, from the 1st of January, 1880.

Leon Benham died on the 25th of April, 1881, and all his interest and share in the partnership of *H. Clarkson & Co.* were acquired by the surviving principal partners, *H. A. Clarkson* and the Defendant.

By a memorandum of the 10th of May, 1882, *H. A. Clarkson* entered into a separate agreement with the Defendant, by which, as between themselves, the ship-broking and insurance business was to be absolutely vested in the Defendant, with power to make any arrangements by taking in new partners, paying to *Clarkson* 12 per cent. of the profits. And as to the ship-owning business, the Defendant was empowered to put it into a limited company, but if this was not done before 1884, it was agreed that *Clarkson* and the Defendant should each hold his shares in the ships in his own name for his own absolute property free from interference by the other.

No company was formed to take over the ship-owning business, but *Clarkson* or his trustees and the Defendant divided the shares of the ships between them.

Acting under the last-mentioned powers the Defendant, on

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the 1st of January, 1885, made a new arrangement with the subordinate partners, who were the Plaintiffs in the present action, and a deed of that date was executed, by which it was provided that the partnership theretofore existing under the articles of 1874, as varied on the death of *Léon Benham* in 1881, and by the memorandum of the 10th of May, 1882, should continue, but that the partnership theretofore existing under the articles of the 28th of December, 1880, should be dissolved and should exist only for the purpose of winding-up the said ship-owning business; and that the said business of ship-broking, insurance broking, and commission agency should be carried on under the style of "*H. Clarkson & Co.*"

By one of the articles it was provided that the leading control and direction of the business should rest with the Defendant during his life, but the Defendant should not be obliged to give more of his time than he should think fit to the business.

The firm of *H. Clarkson & Co.* thenceforward carried on no ship-owning business, and the affairs of that branch of the business had long been completely liquidated.

H. A. Clarkson died in June, 1886.

The Plaintiffs complained that the Defendant had recently commenced to use the style of "*H. Clarkson & Co.*, ship-owning," and to carry on a ship-owning business for his own benefit under that style at the office of the firm.

It was an important part of the ship-broking business to bring about arrangements between buyers and builders of ships, for which they obtained commission. In 1887 the firm of *H. Clarkson & Co.* became aware that the Spanish and Portuguese Governments were contemplating the reconstruction of their navies, and were inquiring concerning the building of new ships of war and torpedo-boats. The firm of *H. Clarkson & Co.* sent out Mr. *Giton*, one of their principal clerks, who was acquainted with the Spanish language, to try and obtain the conduct of the negotiation between these Governments and the English ship-builders. In furtherance of this purpose they endeavoured to form a syndicate of British ship-builders from whom they hoped to obtain authority to enter into such negotiations. A gentleman named Major *Spilsbury* intervened in this business, having ob-

tained an introduction to the firm, and attempted to assist in carrying out their object as he was going to *Spain* on other business, and it was arranged that if he succeeded he should have a share of the commission that might be earned. It appeared that, at least in *Spilsbury's* opinion, any firm which would engage to set up a ship-building yard in *Spain* would be more likely to get Government orders.

While this negotiation was pending, the *Barrow Ship-building Company*, which was not in a flourishing condition, applied to Lord *Rothschild* for advice as to an improvement in their ship-building business, and he recommended them to consult the Defendant *Benham* as a person likely to be of use to them, especially by procuring orders for ships. *Benham* was accordingly consulted, and he recommended them to employ a new manager of great skill, and to lay themselves out for constructing ships of war, and for that purpose to reconstruct their company under a new name. *Benham* went out himself to *Spain* in order to procure orders for the *Barrow Company*, and ascertained that the Spanish Government would prefer to give orders to persons who would build ships in Spanish yards, and that a yard at *Bilbao* belonging to one *Thomas Murietta* might be obtained. *Benham* also came to the conclusion that if such orders could be got for the *Barrow Company* they would facilitate its reconstruction on a broader basis. There was a good deal of correspondence on these matters in April and May, 1887, and many letters were written by *Benham* and *Giton* on *H. Clarkson & Co.'s* paper, and some were signed *H. Clarkson & Co.*, and were copied in their letter books. In one of these letters the reconstruction of the *Barrow Company* was referred to as "being in our hands," and in others the reconstruction scheme, and the scheme for procuring a building yard at *Bilbao* were referred to as matters in which the firm had an interest.

Benham took some part in preparing a prospectus for the new company; but the prospectus ultimately issued was prepared by Mr. *Nordenfelt*, the celebrated engineer, and by a different firm of solicitors from those who usually acted for *H. Clarkson & Co.* The new company was formed under the name of the *Naval Construction and Armaments Company, Limited*, and the Defendant became

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a director with a fixed salary and percentage on the profits of the company. He was also paid considerable sums for his services in reconstructing the company.

Some further details of the matters mentioned above are referred to in the judgments of the learned Judges.

The present action was brought by the subordinate partners in the firm of *H. Clarkson & Co.*, against *Benham*, complaining that he was carrying on the ship-owning business as a separate business on his own account, under the style of "*H. Clarkson & Son*, ship-owning," and claiming an injunction restraining the Defendant from carrying on a ship-owning business, or any other business than the business of the firm, under the style of "*H. Clarkson & Co.*," or any other style only colourably differing therefrom; and a declaration that all commission, profits, and other benefits received by the Defendant from the promotion or formation of the *Naval Construction Company*, and all the salary and emoluments which he received as director of the company belonged to the firm of *H. Clarkson & Co.*; and consequential accounts and relief.

The action came on for hearing before Mr. Justice *Kekewich* on the 15th of May, 1890.

Sir *Horace Davey*, Q.C., *Barnes*, Q.C., and *Upjohn*, for the Plaintiffs, relied on *Dean* v. *MacDowell* (1).

Rigby, Q.C., *Warmington*, Q.C., and *Christopher James*, for the Defendant.

KEKEWICH, J.:—

The two points on which I am now asked to express an opinion are entirely independent the one of the other. They arise with reference to the same articles of partnership, with reference to the same firm, and in the same action; but they really are so distinct that they might be the subject of two different actions, and hardly anything can be said respecting one which will have any real immediate bearing upon what ought to be said as regards the other. I propose, therefore, to deal with them separately.

(1) 8 Ch. D. 345.

The first, and by far the most important question of the two, and indeed the most important question in the action from beginning to end is that whether Mr. *Benham*, the Defendant, is entitled, as he claims to be entitled, to carry on a business in the name of *H. Clarkson & Co.*, notwithstanding that, as a member of the firm of *H. Clarkson & Co.*, he is carrying on some other and separate business. To my mind there is no question of law for decision. The law is perfectly clear, and the only question for decision is, what is the meaning of the contract entered into between the parties?

[His Lordship then considered the effect of the various documents relating to the partnership referred to above, and continued:—]

I think, therefore, that Mr. *Benham* is entirely wrong in the construction that he has put forward, and that he cannot be allowed to do that which he is anxious to do. What he is actually doing I do not think can hurt anybody. He is using the firm's paper, which is a mere trifle, and he does not seem to be in a proper sense of the term carrying on business, but he claims to be entitled to carry it on, and that claim makes it necessary for the Court to decide whether he is entitled or not; and, as I have already said, I think he is not. It may be necessary to make some further provision for his protection, in order that, if there is anything yet to be done in winding-up the old ship-owning business in which the firm's name has to be used, he may not be deprived of the power of realizing his property. Subject to that, I think that he must be restrained from using the style or firm of *H. Clarkson & Co.*, except as a member of the partnership, constituted by the deed of 1885, and for the purposes of that partnership.

The other point is, as I have said, entirely independent of this point, and there again, to my mind, there is no question of law involved. It seems to me a mere question of fact. In saying that, I am bearing in mind that the partnership law on this branch of the case has been well settled, and is summarized by Lord Justice *Cotton* in three propositions in the case of *Dean* v. *MacDowell* (1), which I think it unnecessary to read, but which I take to be all

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that is important for the present purpose. If the Plaintiffs bring Mr. *Benham's* action within either of these propositions they are entitled to relief. If they cannot, they are not entitled to relief.

Now, the question I have to consider is, whether Mr. *Benham* can retain for his own benefit, independently of the firm, such commission, profit, or other benefits as have come to him as engaged in the formation of the *Naval Construction and Armaments Company*, or as a director of that company since its formation. That part of the case which deals with this matter also deals with the endeavour to get contracts in *Spain* and *Portugal*, and it is not denied that if these endeavours had been successful, any benefit which has accrued to Mr. *Benham* by means thereof would have been partnership accounts, and would have to be accounted for to his co-partners. But no benefit has accrued, and the only interest in the Spanish project now is its connection with the *Naval Construction and Armaments Company*. Now I have to deal, as I have said, with a question of fact, and it depends to a certain extent on oral evidence and to a certain extent on documents. [His Lordship then referred to and commented on Mr. *Benham's* evidence, and continued:—] I do not propose to go through the documents. I do not propose to go through the history of the case which has been fully threshed out, but I have no doubt at all that the *Naval Construction and Armaments Company* in its present form, that is to say, the prospectus as it was issued, and the limits of the company as established in that prospectus is in the main due to what occurred in *Spain*, to the negotiations entered into and the information gained by *Giton* and Major *Spilsbury*, as the agents of the firm of *H. Clarkson & Co.*, and to the knowledge thereby gained by Mr. *Benham*, to whom, as a member of *H. Clarkson & Co.*, the reconstruction of the company was entrusted. That is my conclusion. I am satisfied that whether something would have been done or not without that knowledge and information, the company would never have been floated in its present form if that knowledge and information had not reached Mr. *Benham*, and been made use of by him. I am aware that the first prospectus, which was really his, does not contain any allusion to this Spanish project, because at that

time either it had not been advanced sufficiently, or he had not the knowledge and information which would enable him to make use of it in a prospectus of the new company. I am aware, of course, that before the company was actually floated, before the prospectus which was published to the world was ultimately settled, the matter had passed into the hands of other solicitors, and Mr. *Benham* was not nominally, at least, giving instructions for the prospectus, but he hardly denied himself, and it would be idle to deny that he took a large interest in the concern from first to last. In fact he told us that he did give labour and time and thought to the business of the company, and he did not attempt to say that the expenditure of labour, time, and thought ceased at any particular moment, or that it was not continued throughout the final settlement of the prospectus and until the actual formation of the company. The prospectus of the company I regard as his work. It bears on the face of it the knowledge and information which he had obtained, and which is put forward as the great advantage of this new company.

Mr. *Benham* was oblivious of the time when he was appointed a director. He was not appointed a director by the articles of association, but some little time afterwards; and, therefore, what expectation he had of being a director was only expectation, and there was no contract which he could enforce, but it was an expectation founded, I have no doubt, on engagements of men of honour, and I treat him to all intents and purposes as a director from the first moment. I cannot see any distinction between the commission which he earned from the different gentlemen who had been mentioned and the profit which he made as a director. I think they were all earned by him because, being a member of the experienced firm of *H. Clarkson & Co.*, he was selected to do this particular work—the senior partner, the man who had given his time and attention to matters of business, more or less connected with shipping, although not building ships—and it was because of that he was engaged in the reconstruction of this company, and being so engaged was selected as a director of the company when reconstructed. Does it not, therefore, follow that what he has earned belongs to the firm? That depends entirely upon this—Was it, or was it not, firm business? Mr. *Giton* was

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the agent of the firm, and of course was paid by the firm. Major *Spilsbury* was the agent of the firm. About that I have no doubt. When Mr. *Benham* wishes to arm Major *Spilsbury* with authority to act on behalf of the *Barrow Company*—that is to say, on behalf of the new company, which not being then in existence could not itself give a procuration—he described himself as "the senior partner of the firm of *H. Clarkson & Co.*" He did it because he was a member of the firm, he did it as a member of the firm. Major *Spilsbury* did not represent Mr. *Benham*, but represented the firm, and throughout I treat this business as having been done on behalf of the firm. Was there anything improper in that? I do not think I need really enquire whether it was within the business of the firm as described in the deed of 1885. The partners were perfectly competent to add anything to that business, any item connected with, or disconnected from, the business there described, and I have no doubt that they knew what was going on, and must have known what was going on, and that they sanctioned the employment of *Giton*; and if they did not actually know what Major *Spilsbury* was doing, I think they must be treated as having sanctioned also his employment. But, as a matter of fact, it was reasonably part of the business of the firm, business which might reasonably be undertaken by any partner as the agent of his co-partners. It was the introduction on a large scale of the purchasers of ships to the builders of ships, and it seems to come directly within the description of the business, and we know from Mr. *Benham* himself that that sort of business was done occasionally, and there is no reason why it should not be done again.

Therefore, on all those grounds, I come to the conclusion that what Mr. *Benham* did in reconstituting the company, and that what he has done as a director of the company has been done as a member of the firm of *H. Clarkson & Co.* on the firm's account, and that he must therefore bring those sums into account as part of the partnership assets.

[His Lordship refused to interfere by injunction to restrain the Defendant from acting in future as a director of the *Naval Construction Company*, and gave no costs to either party.]

From this judgment the Defendant appealed. The appeal came on to be heard on the 16th of March, 1891.

Rigby, Q.C., *Warmington*, Q.C., and *Christopher James*, for the Appellant:—

With respect to the first point, we say that on the true construction of the partnership articles, and considering the relation between the partners appearing, the Defendant had a right to use the old partnership name in carrying on a separate ship-owning business. On the second point, we contend that the transactions with the *Naval Construction Company* were beyond the scope of the partnership between the Defendant and the Plaintiffs, and that the Defendant was not bound to account to the Plaintiffs for any profits that might be made by him. He did not in any way use the property of the firm, or his position as a member of it, in these transactions: *Dean* v. *MacDowell* (1).

Sir *Horace Davey*, Q.C., *Barnes*, Q.C., and *Upjohn*, for the Plaintiffs:—

There is nothing in the articles of partnership, or in the history of the case, to take it out of the ordinary rule, that a member of a partnership cannot use the partnership name in a separate business. As to the second point, we say that the Defendant made use of the information and influence which he obtained as a member of *H. Clarkson & Co.*, in setting up the *Naval Construction Company*, and in obtaining them orders. It is established law that a partner who uses the partnership property, name and influence in another business must account to his co-partners for any profit which he makes by so doing. The case is within the rules laid down by *Cotton*, L.J., in *Dean* v. *MacDowell*.

Rigby, in reply.

1891. March 24. LINDLEY, L.J.:—

This is an appeal from an order made by *Kekewich*, J., granting an injunction to restrain Mr. *Benham* from using the name of

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H. Clarkson & Co., except for the purpose of winding-up what is called the ship-owning business, and carrying on what is called the ship-broking business, and also declaring that the firm of *H. Clarkson & Co.* were entitled to certain moneys paid to him for his services to the *Barrow Ship-building Company* in relation to the *Naval Construction and Armaments Company*, and for his salary and remuneration as a director of the company.

The two questions thus raised are quite distinct, although both turn on the rights and obligations of Mr. *Benham* towards his co-partners, and these cannot be ascertained without knowing the nature of the partnership and the terms of the agreement into which they had entered, and the course of dealing with each other.

[His Lordship then considered at length the partnership articles before referred to, and gave his opinion that there was nothing either in the deed of 1885, or in the facts proved in evidence, to warrant the conclusion that the Defendant *Benham* was to be at liberty to carry on business on his own account in the name of the firm. So far, therefore, as the use of the former name was concerned, his Lordship ruled that the appeal must be dismissed.

With respect to the second point—namely, the claim to the moneys paid to the Defendant *Benham* for his services in assisting the *Barrow Ship-building Company*, and in forming the *Naval Construction and Armaments Company*, and also to his salary as director of that company—his Lordship stated the facts relating to the questions as given above, and then proceeded as follows:—]

The Plaintiffs' claim is based upon the ground that the reconstruction scheme grew out of the negotiations which were going on in *Spain*; that it was a means for obtaining orders; that Mr. *Benham* made use of information obtained by him as a member of the firm of *H. Clarkson & Co.*; that he made use of his connection with it; that he used the name of the firm and represented it as reconstructing the *Barrow Company*, and that his partners were entitled to take him at his word and treat him as acting for and on behalf of the firm throughout this business.

Reliance is placed by the counsel of the firm on the judgment of Lord Justice *Cotton* in *Dean* v. *MacDowell* (1). The answer, however, to this claim is short and conclusive. It was no part of the business of *H. Clarkson & Co.* to promote or reconstruct companies, nor to advise them how to improve the management of them. All such matters were quite foreign to the business of *H. Clarkson & Co.* Moreover, notwithstanding the expressions used in the letters to which reference was made, it is quite clear that the name of the firm was never in fact used for reconstructing the *Barrow Company* or for forming the *Naval Construction Company*, and that the Plaintiffs never authorized Mr. *Benham* to act for the firm in any such matters, and never, in fact, agreed to extend the business of the firm so as to include the bringing out of any company. He never was in fact acting for his firm in this matter, nor did his partners ever suppose he was, or treat him as so acting. Nor is it true in fact that Mr. *Benham* or the company for which he was acting ever derived any benefit from his connection with the firm of *H. Clarkson & Co.* It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name or business connection; but the facts of this case do not bring it within this principle. It is equally clear law that if a partner without the consent of his co-partners carries on business of the same nature as, and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business, but the facts of this case do not bring it within this principle. *Dean* v. *MacDowell* shews that a partner is not bound to account to his co-partners for profits made by him in carrying on a separate business of his own, unless the case can be brought within one or other of the two principles to which I have alluded, even if he carries on such separate business contrary to one of the partnership articles. As regards the use by a partner of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is

(1) 8 Ch. D. 345.

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within the scope of the partnership business, or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business, nor does the language of Lord Justice *Cotton* in *Dean* v. *MacDowell* (1) warrant any such notion. By "information which the partnership is entitled to" is meant information which can be used for the purposes of the partnership. It is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefit from information which he obtains as a partner would be manifestly absurd. Suppose a partner to become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject, could the firm claim the profits thereby obtained? Obviously not, unless, by publishing the book, he in fact competed with the firm in their own line of business. For these reasons, the claim of the firm to the money received by Mr. *Benham* for reconstructing the *Barrow Company*, and for forming the *Naval Construction Company* must be disallowed.

There remains the claim to his remuneration as director of the *Naval Construction Company*. The grounds on which this claim is said to be supported are even weaker than those relied on in support of the claim which has already been investigated. Mr. *Benham* is not even bound to give his whole time to the business of the firm, and the *Naval Construction Company* are in no way rivals of the firm. It is true that being a paid director of the company he may not find it so easy as he otherwise might to obtain orders from customers, and also to obtain commissions on those orders. It is conceded that any commissions he can get will belong to the firm, and it may be that the firm will not gain but suffer loss by reason of Mr. *Benham's* position as a director of the company, but assuming this to be the case it will not entitle the firm to his remuneration as director. This is clear

(1) 8 Ch. D. 345.

from *Dean* v. *MacDowell* (1) and obviously follows from the principles already explained.

In the result, therefore, the judgment appealed from must be affirmed so far as it relates to the injunction against using the name of the firm, and reversed so far as it directs an account of the moneys received by Mr. *Benham* for reconstructing the *Barrow Company* and for forming the *Naval Construction Company*, and an account of his salary and remuneration as a director of the company.

The appeal failing in part, and succeeding in part, there will be no order as to the costs of the appeal.

BOWEN, L.J., said that he agreed with the opinion which had been expressed by Lord Justice *Lindley* on the first point in the case; and continued as follows:—

With regard to the second point, it seems to me that the judgment of Mr. Justice *Kekewich* cannot be supported. The claim of the Plaintiffs, put briefly, is to appropriate to themselves the remuneration obtained by Mr. *Benham* for advising and assisting in the reconstruction of the *Barrow Company* and the formation of the new company, and the emoluments which he has since derived from playing an active part in the management of the new company, or in the direction of the new company. It is said that the reconstruction scheme grew out of the work done in *Spain*—that it was really a matter in which the company were interested, inasmuch as the creation of this new company would affect their obtaining orders—and that the information which Mr. *Benham* used in advising the *Barrow Company* to reconstruct itself, and to form the new company which has been formed at the *Barrow* yard, was information to which the partnership were entitled, and the emoluments derived from the use of which they have a right to assume for themselves. It seems to me, for the reasons given by my Brother, the Lord Justice *Lindley*, that this contention cannot be supported. I think that when Lord Justice *Cotton* said that a partnership was entitled to the profits which arose out of information obtained by one of the partners as partner, he was speaking of

(1) 8 Ch. D. 345.

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information to which the partnership was entitled in the sense in which they are entitled to property. I think you can only read the sentence in which the expression occurs in that way. It is as follows: (1) "Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property." The language, like all Lord Justice *Cotton's* language, is perfectly precise and neat. He is speaking of information which a partnership is entitled to in such a sense that it is information which is the property, or is to be included in the property of the partnership—that is to say, information the use of which is valuable to them as a partnership, and to the use of which they have a vested interest. But you cannot bring the information obtained in this case within that definition.

I only wish to say one word as expressive of my own opinion upon what I think is the strongest way of putting the case against Mr. *Benham*. It may be said, and has been said with great force, that there are letters here in this case written in the firm-book by Mr. *Benham* or by his authority, in which Mr. *Benham* represents that he is doing this business, not on his account only, but on account of the firm; and it has been said that this is evidence against Mr. *Benham* of an agreement between the partners to include in the scope of the partnership business, which I think we all must agree was but for such an agreement outside the scope of the partnership. Now it is true that those letters are evidence against Mr. *Benham* of what they contain; but one must be careful to see exactly what it is that these letters tend to shew; and, to my mind, reflection convinces me that they do not really shew, or tend to shew, that there was a tacit agreement between the partners and Mr. *Benham* that the scope of the partnership business should be so enlarged. It is not a question of ratification in the ordinary sense—it is not a question, that is to say, of the firm afterwards, by an *ex post facto* consent, giving validity to an act done professedly on their behalf towards third persons which, in reality, was done without their authority. It is not a question which arises between third

(1) 8 Ch. D. 354.

parties and the partners. Nor is it, indeed, a question of ratification between the partners and Mr. *Benham*, in the sense of the validation by them, *ex post facto*, of an assertion of his of a mandate from them to him to act. It must amount to evidence of a contract, or nothing—of the establishment of a new contractual right between Mr. *Benham* and his firm, or nothing. Now, I think that it does not amount to that. I do not think it can be said to shew that Mr. *Benham* offered to his firm to treat this business as partnership business. I do not think that was the true business view of what was done. I think he was using his partnership name towards third persons; and if third persons had dealt with Mr. *Benham* upon the faith of the expressions contained in those letters, which indicated that the partnership were behind him, it seems to me the partnership would have had a right to ratify Mr. *Benham's* use of their name, and to take the benefit of any advantages from the third persons which had accrued in consequence of the contract which the third persons had made with Mr. *Benham* upon the letters. But this is a question between Mr. *Benham* and his firm; and although I think Mr. *Benham* was using the firm's name for his own purposes as regards the Spanish correspondence, I do not think that he meant, or that his partners ever really assented to the suggestion, that as between himself and his partners, he proposed to enlarge the scope of the partnership business, and to take in this business as partnership business. That seems to me to be the true answer to the difficulty, which, to my mind is the greatest on this part of the case.

With regard to his remuneration as a director, I have nothing to add to what has been said by my learned Brother.

KAY, L.J., gave judgment to the same effect as the other Lords Justices on the first question in the action, and then referred to the facts specially relating to the second question. His Lordship proceeded as follows:—

The prospectus upon which the *Naval Construction Company* was finally launched was much relied on by the Plaintiff because it holds out as an inducement to the public to take shares the expectation of some orders from the Spanish and Portuguese

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governments; and in particular for this purpose it mentions the probable establishment of a yard in *Spain* by purchasing a site near *Bilbao*, which had been suggested by Major *Spilsbury*, who had put *H. Clarkson & Co.* in communication with Messrs. *Murietta*, the owners of the site in question. Great reliance was placed upon this as shewing that advantage was taken of information obtained by *H. Clarkson & Co.*, but still more stress was laid upon a telegram and some letters written on paper of the firm in the course of the negotiations to put the foreign governments in communication with the ship-builders in this country, in which it was stated that the reconstitution of the *Barrow Company* was in the hands of the firm of *H. Clarkson & Co.* If this reconstitution had been within the scope of the business of *H. Clarkson & Co.*, all these circumstances would be of importance; but it was not. There is no evidence of any agreement or intention of the firm to enlarge their business so as to include it. It is not shewn that these letters, though entered in the firm's press-copy letter books, were ever seen by the other partners. It is not suggested that any alteration of their position took place on the faith of the statements contained in them. The new *Barrow Company* was established as a ship-building company. Their business in no way competes with that of *H. Clarkson & Co.* The position of director of that company is not inconsistent with that of a partner in the firm. On the contrary, it may enable Mr. *Benham* to assist the firm in its proper business. By the terms of the partnership articles of 1885 he was not bound to devote all his time to the business of that partnership, so that there is no breach of any provision of those articles in what he has done. The attempt to obtain part of the contracts for warships for *Spain* or *Portugal* has not succeeded. If it had, the firm would have obtained the commission, which was all the advantage that they were looking for. The *Barrow Company* have not set up any yard in *Spain*.

A strong effort was made in argument to bring this case within the law as stated by Lord Justice *Cotton* in *Dean* v. *MacDowell* (1), which is a statement of the law of partnership in language more expanded than that in sect. 29 of the *Partnership Act* of 1890. I

(1) 8 Ch. D. 345.

think that attempt has failed. The case seems to me to be covered by that which determined that the profits of a different business, though in the same article—salt—to which the business of the firm related could not be claimed by co-partners, even where the partner who had embarked in such business infringed in doing so a provision in the articles by which he was bound to give his whole time and attention to the concern of the partnership, and not to engage in any other business. On this question, for the reasons I have given, I differ with respect from the conclusion of the learned Judge in the Court below, both as to the commission and remuneration as director of Mr. *Benham*, to which, in my opinion, his co-partners have no claim.

I concur in the order which the Lord Justice has proposed.

Solicitors for Plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for Defendant: *Druces & Attlee.*

M. W.

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Nov. 14.
1891
April 8, 18.

Power—Executor renouncing.

A testator bequeathed a legacy to *A. H.* to be paid to her on attaining sixteen; in the event of her dying under that age "the amount to remain at the disposal of my executors for distribution to such charities or charitable institutions as they approve of." After bequeathing other legacies, he appointed *C.*, *F.*, and *J.* his executors. He then bequeathed legacies to several charitable institutions, and bequeathed the residue "to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of." *C.* and *J.* proved the will. *F.* renounced probate:—

Held (reversing the decision of *Kekewich*, J.), that *F.* could not act in the exercise of the power of selecting charities and distributing the residue amongst them:

Held, that the power was given to the executors in the character of executors, and that the two who had proved could exercise it alone.

THIS was an appeal from a decision of Mr. Justice *Kekewich* (1).

J. H. Mainwaring, by will dated the 12th of October, 1877, after bequeathing some pecuniary and specific legacies, bequeathed to *Annie K. Hughes* the sum of £100, to be paid to her

(1) 43 Ch. D. 643.

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on attaining the age of sixteen years, "in the event of her decease prior to which time the amount to remain at the disposal of my executors for distribution to such charities or charitable institutions as they approve of." After giving another legacy, he bequeathed "to my executors herein named the sum of £50 each for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them, and I hereby appoint *Joseph D. Crawford*, of . . . M.D., *John Forshaw*, of . . . and *William Jones*, of . . . executors of this my will. I also bequeath and devise to the several charitable institutions hereafter named the respective amounts written opposite each institution, viz." [here followed the names of the *Royal Infirmary* and seven other institutions with definite sums set against them]. "The residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of."

The will was proved on the 4th of January, 1889, by *Crawford* and *Jones*, *Forshaw* renouncing probate.

The questions then arose whether *Forshaw* was entitled to the legacy of £50 intended for him, and whether he was entitled to take part in the selection of the charitable institutions among which the residue was to be divided. Mr. Justice *Kekewich* decided that he was entitled to his legacy, and subsequently that the selection of the charitable institutions was to be made by *Crawford*, *Jones*, and *Forshaw*.

From this last declaration *Crawford* and *Jones* appealed, serving the notice of appeal on *Forshaw* only.

1890. Nov. 14. The appeal was argued by *Neville*, Q.C., and *J. D. Crawford*, for the Appellants, *Forshaw* not appearing, and judgment was reserved. On the 22nd the Court mentioned the case, and directed that the Attorney-General should be served. He was served accordingly, and the appeal was restored to the paper.

1891. April 8. *J. D. Crawford*, for the Appellants:—

We contend that *Forshaw* cannot concur in the exercise of the

power, having renounced the character in which it was given to him: *Keates* v. *Burton* (1). In that case the point was argued and decided, and Mr. Justice *Kekewich* was in error in supposing the contrary. *Attorney-General* v. *Fletcher* (2) is a decision in point. *Hibbard* v. *Lamb* (3) tends the same way. The power here is not a naked power, but a power coupled with an interest, which would survive: *Attorney-General* v. *Gleg* (4); and so, if one renounces, the others can exercise it.

[KAY, L.J., referred to *Sugden* on Powers (5).]

Mr. Justice *Kekewich* was misled by the observation on page 118, which applies only to naked powers. Our contention is supported by 20 & 21 Vict. c. 77, s. 29. If the testator had meant to give the power to these three gentlemen as individuals, he would have named them instead of describing them as "my executors herein named."

The renouncing executor did not appear.

Ingle Joyce, for the Attorney-General:—

I agree with the argument of the Appellants that a renouncing executor cannot exercise the power; but I contend that the power can only be exercised by all three, and that as one is incapacitated it cannot be exercised at all. If it had been given "to my executors" I should have had nothing to say, but "to my executors herein named" is quite a different expression. There are three ways in which a power to persons who are executors may be given—"to my executors," to "*A.*, *B.*, and *C.*, my executors," and "to *A. B.*, and *C.*"

[KAY, L.J.:—In the second case, suppose the testator revokes the appointment of *A.*, *B.*, and *C.*, as executors, and substitutes *D.*, *E.*, and *F.*?]

Then the power is gone. It can only be exercised by *A.*, *B.*, and *C.*, who must also be executors. In *Peyton* v. *Bury* (6) a power to consent to a marriage given to "*A.* and *B.*, my executors," was held to be destroyed by the death of one.

(1) 14 Ves. 434.
(2) 5 L. J. (N.S.) (Ch.) 75.
(3) Amb. 309.
(4) 1 Atk. 356.
(5) 8th Ed. p. 128.
(6) 2 P. Wms. 626.

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[KAY, L.J.:—Was not that a naked power?]

No; the executors had the estate vested in them. In *Cole* v. *Wade* (1) a power implying personal confidence exerciseable by the testator's trustees and executors, and the heirs, executors, and administrators of the survivor of them, was held not exerciseable by the devisees and executors of the survivor. The observations of Sir *W. Grant* (2) have a strong bearing on the present case.

Crawford, in reply:—

It would be a whimsical case that the £100 can be dealt with by the Appellants, and that another fund given in charity by the same will cannot.

1891. April 18. LINDLEY, L.J.:—

This is an appeal from the decision of Mr. Justice *Kekewich* (3). The appeal raises the question whether two out of three executors who are named in the will of the testator have or have not the power of saying amongst what charities the residuary estate of the testator should go. There were three executors, and one of them, Mr. *Forshaw*, renounced probate, which has given rise to the difficulty. Mr. Justice *Kekewich* has held that, on the true construction of the will, the power to which I have alluded, and which I will read presently, is exerciseable by Mr. *Forshaw* and the two who have proved. The two who proved have appealed from that decision, and their contention is that they are entitled to exercise this power, and that Mr. *Forshaw* is not. The case came before the Court some time ago, and it struck us that it would not be right to decide this question in the absence of the Attorney-General, because it appeared to be a possible view that none of them might be entitled to exercise this power, and that it might fall to the Crown, or to the Attorney-General representing the Crown, to deal with this residue by a scheme or otherwise. Accordingly, the case stood over in order that the Attorney-General might be served, and Mr. *Ingle Joyce* appeared for the Attorney-General on the hearing before us.

The will is a short one. It begins by bequeathing a few

(1) 16 Ves. 27. (2) 16 Ves. 47.
(3) 43 Ch. D. 643.

legacies, which we may pass over. Then there is a legacy to *Annie Katie Hughes*, which is material because of the last two or three words of the gift. The testator bequeaths to her a sum of £100, to be paid on attaining the age of sixteen years, "in the event of her decease prior to which time the amount to remain at the disposal of my executors for distribution to such charities or charitable institutions as they approve of." The executors had not been named before that clause, but are named afterwards. The importance of this clause is, that thereby the testator gives a discretionary power to his executors to distribute in a particular event the sum of £100 to such charities or charitable institutions as they approve of. Pausing there for a moment, I do not suppose that it could be controverted that the persons to exercise that power would be the executors who proved. It is a power given to the executors in their official capacity. If three were named, and one renounced and two proved, those two could exercise that power; and if one of those two died, the survivor, I suppose, could exercise the power. I do not apprehend that there would be any difficulty about that. This clause is important, because it throws light upon the other power, to which I shall refer presently. The testator then bequeaths "to my executors herein named the sum of £50 each for the trouble they may have in the execution of this my will, and also to mark my friendship and regard for them." Now, under that clause, although Mr. *Forshaw* renounced probate, Mr. Justice *Kekewich* held that he was entitled to the legacy of £50 by reason of the last words which I have mentioned—the words denoting friendship. Then the testator says: "I hereby appoint *Joseph D. Crawford*, *John Forshaw*, and *William Jones* executors of my will." Then he gives to certain charitable institutions the sums thereinafter mentioned, which I need not read. Then comes the clause which has given rise to the controversy on the present occasion: "The residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of." That is the clause with which we have to deal. Mr. Justice *Kekewich* has construed the expression, "my executors herein named," as equivalent to

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writing out the names of the three executors who were appointed by the previous clause in the will, and he has construed this power as a naked power, and not as a power coupled with an interest given to them in their official capacity. It is with reference to testing the accuracy of that view that I have referred already to the previous clause about *Annie Hughes'* legacy of £100. It would be strange that, upon a will constructed like this, there should be two sets of persons exercising discretionary powers as to distribution among charities—namely, one set consisting of the executors, whoever they are, and the other consisting of three persons named, whether they accept the office of executors or not. We do not find from Mr. Justice *Kekewich's* judgment that his attention was called to the clause relating to *Annie Hughes'* legacy, nor was our attention called to it by counsel, and we only found it out by looking into the will. I myself attach considerable importance to it.

Now, the principle applicable to a case of this kind is this—to determine from the language of the will whether this power is given to the executors as three individuals, or whether it is annexed to their office. If it is annexed to their office, then the appeal ought to be allowed. With reference to that particular point, there are two cases to which it is useful to refer. One is *Keates* v. *Burton* (1), which was referred to before Mr. Justice *Kekewich*; and there is another still clearer, of the *Attorney-General* v. *Fletcher* (2), which was not referred to before him. There a power was given to "Dr. *J. Madden*, sole executor of this my last will and testament." He renounced probate, and the decision was that he could not exercise the power. The distinction between that case and this I cannot see.

Now, construing this will to the best of my ability, having regard to the clause as to *Annie Hughes'* legacy, to which, as I said before, I attach considerable importance, it appears to me that the will gives this power to the executors in their official capacity, and that but for this office they would not have had the power. That is the conclusion to which I have come. The consequence is that Mr. *Forshaw*, who has renounced, is not at liberty now to exercise this power, and the two executors who

(1) 14 Ves. 434. (2) 5 L. J. (N.S.) (Ch.) 75.

have proved are the persons to exercise it. Mr. *Ingle Joyce*, on behalf of the Crown, argued that the executor who had renounced could not join in the exercise of the power, that the power could only be exercised by the three, and as one of them could not concur in its exercise it could not now be exercised at all. The answer to that argument is that the power is given to the executors as executors, and by virtue of their office, and not as individuals.

We therefore propose to vary the order by declaring that Mr. *Forshaw*, having renounced probate, is not entitled to exercise this power, or to concur in exercising it, but that the power is exerciseable by the two gentlemen who have proved the will.

BOWEN, L.J.:—

I am of the same opinion, and I only propose to add one or two words, because we are differing from the Court below.

I regard this case as purely one of construction—one in which, therefore, we may well be guided, and in which I am personally very glad to be guided, by the reasoning in previous cases, and by general principles of law, but in which we are not concluded by authority. We must construe the will by the light of its own terms and the real question here is, as it seems to me: In what capacity do the donees of the power contained in the last clause of the will of selecting charitable institutions take that power? The words are, "The residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select." It has been argued that these words give to the three persons as persons what may be called a bare power. On the other side, it was contended that the power was given to the executors in their official capacity, and that as the office survived so also would the power. To my mind, for the reasons which the learned Lord Justice who has preceded me has given, it is difficult to conceive that this power was not in some sense coupled with the office—that is to say, I think that it was in a sense given to the executors in their official capacity. But then came Mr. *Ingle Joyce's* argument, which certainly was an ingenious one, and the logical reasoning of which I accept. As a testator is free to do what he pleases, it

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seems to me that even if you find in a will a power given to executors in their official capacity there may be such an indication of reliance on the just judgment of the individuals as would make it impossible, if one or more renounced, for the others to act; but I think that such reliance must be expressed in clear and apt language. Now, the only words in this will from which the intention can be extracted that there is a confidence reposed in the individuals apart from their official capacity are the words "herein named," and Mr. Justice *Kekewich's* judgment turned upon them. To my mind, it is giving too much force to the words "herein named" to imply, that in this particular clause the fetter was imposed upon them that all must act or none. I think that if the testator had intended that to be the way in which the machinery of his will would work, he would have used much more clear and precise language to convey that intention. I fail to find in the words "herein named," such an indication of personal reliance on the judgment of the individuals as he appears to have found, and the finding of which seems to me to be the basis of his judgment.

KAY, L.J.:—

I also agree that the question is entirely one of construction of this particular will, and I will state my view very shortly. As Lord Justice *Lindley* has pointed out, the testator gives a legacy of £100 to be paid to *Annie Hughes* on her attaining sixteen years, "in the event of her decease prior to which time the amount to remain at the disposal of my executors for distribution to such charities or charitable institutions as they approve of." After giving two other legacies, he appoints three persons, named *Crawford*, *Forshaw*, and *Jones*, "executors of this my will." Then follows a gift to charitable institutions, and lastly comes this particular power of selection, which is worded thus: "The residue of my estate I leave and bequeath to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of." Now, the real question is whether those words "herein named" limit and control the power which was given to his executors. If the words "herein

named" had been left out, the question would not have arisen. The addition of these words "herein named," especially having regard to the similar power which is given to the executors in the earlier part of his will, seems to me really not to make any serious difficulty in the matter; "herein named" means no more than "hereby appointed," and I come to the conclusion that on the construction of this particular will a power is granted which is attached to the office of executors, and, that being the case, of course the power can be exercised by the executors for the time being.

Solicitors: *Miller & Williamson, Liverpool; Solicitor to the Treasury.*

H. C. J.

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Feb. 27;
March 3.
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Libel—Injunction—Jurisdiction—Discretion—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8 [*Revised Ed. Statutes, vol. xvii., p.* 78].

The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable.

An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.

Decision of *North*, J., granting an interlocutory injunction to restrain the publication of an alleged libel, reversed, *Kay*, L.J., dissenting.

THIS was an action for libel. The Plaintiffs were *Gustave Richard Bonnard* and *Arthur Henry Deakin*, trading as the *Mercantile and General Trust* at *Broad Street Avenue.* The Defendants were, *Charles W. Perryman*, the publisher, proprietor, and editor of a weekly newspaper called the *Financial Observer and Mining Herald*; and *Clement Allen*, sued as the printer of that newspaper. Both Defendants swore that the Defendant *Allen* was not the printer, and that the Defendant *Perryman* was; but there was

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evidence which satisfied the Court that the Defendant *Allen* had, in fact, printed the numbers of the paper referred to below.

The writ was indorsed with a claim for an injunction to restrain the Defendants "from selling, circulating, or delivering, or communicating to any person or persons, any copy of the *Financial Observer and Mining Herald* of the 7th of February, 1891, containing an article headed 'The *Fletcher Mills* of *Providence, Rhode Island,*' or of the said article, and from printing or publishing in the said newspaper, or otherwise, any statement imputing to the Plaintiffs, or either of them, fraudulent or dishonest conduct in connection with the promotion or floating of *Sykes Brewery* or the *City of Baltimore United Breweries,* or the promotion of the proposed *Providence and National Worsted Mills, Limited,* or imputing or suggesting that the Plaintiffs, or either of them, have or has bribed, suborned, or conspired with the proprietors or editors of the *Financial News,* or any other newspaper proprietor or other person, or that they or either of them have or has been guilty of stealing or other dishonest conduct.

"£5000 damages for libel."

A motion was now made on behalf of the Plaintiffs for an *interim* injunction, till trial, substantially in the terms of the claim for an injunction indorsed on the writ.

In the number of the *Financial Observer* of the 10th of January, 1891, there appeared the following remarks:—

"By the way, there appears a very peculiar connection between *Marks, Campbell,* and the gorgeous *Mercantile and General Trust and Finance Company, Unlimited,* located in the sumptuous offices in *Broad Street Avenue,* where the lovely *Engel* is on guard. We shall have a rare budget to say about this curious concern and those working the oracle."

The article in the number of the 7th of February, which was complained of, was headed—

"The *Fletcher Mills* of *Providence, Rhode Island.*

"The *Providence and National Worsted Mills, Limited.*

"A Jews' Den.

"Marks' Promoting Vehicle."

It proceeded:—

"In 1889 offices were taken at 143, *Cannon Street,* by a couple

of Jews, named *Gustave Richard Bonnard* and *Arthur H. Deakin*, who styled themselves the *Mercantile and General Trust*. How they got into the offices we cannot understand, for they had not a sixpence in the world; the furniture was obtained on the hire system, and they often had to beg a lunch. They were, however, of a very enterprising nature, although young, and they were lucky enough to ingratiate themselves with the great *Harry Hananel Marks* by offering him inducements to puff the *Sykes Brewery*, which had by some means come into their hands. We are not yet concerned with the circumstances connected with the floating of this brewery, but we shall have more to say soon. Having made a fair start, and been enabled to open a banking account, they are next found dealing with some American breweries, called the *City of Baltimore United Breweries*, which were floated in due course, and now have their habitation in *Broad Street Avenue*. There was some very shady work in this business. The plunder amounted to no less than £58,000, and an action is now pending over a commission note for £3000 given by *Arthur H. Deakin*, which he is endeavouring to repudiate.

"In both these concerns they were greatly assisted by a *Bernard Engel*, a brother of a money-lender in *Great Marlborough Street*, who knew the corners in which shares could be pushed, and who also had a large Jewish connection. This *Bernard Engel* figures in *Broad Street Avenue* as *D. Engel*, and at times he has varied his name into *Engle*, *Angle*, and *Eagle*, to meet different phases of promoting and dodging.

"Success has so far crowned their shady deeds, and having such a wonderful engine as the *Financial News* at their disposal, on terms, we next find them at work, altogether, at the *Broad Street Avenue*, where they flourish as the *Mercantile and General Trust Finance Company*. This concern is composed of the following Jews:—*Bernard Engel, Gustave Richard Bonnard, Arthur H. Deakin, Edmund Campbell, alias Callisher*, a member of the *Stock Exchange, Harry Hananel Marks*. The next bit of company promoting to come before the public is the *Providence and National Worsted Mills, Limited*."

After some remarks as to the promotion of that company and

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extracts from the *New York Herald*, in one of which "An English syndicate, represented by *G. R. Bonnard* and *D. Eagle*, who are said to be connected with the *Bank of England*," was stated to have bought the *Fletcher Mills* and another mill in *Rhode Island*, the article proceeded:—

"If these gentlemen 'connected with the *Bank of England*' only made £58,000 over the *Baltimore* breweries, they appear to have a chance now of making far more over this deal. But when our readers have carefully considered what a wretched halo of picking and stealing surrounds the den in *Broad Street Avenue*, they will think twice before putting their hard-earned savings into the pockets of these gentry. The board of directors headed by Lord *Suffield* is a group of guinea pigs; but how such names as *Bircham & Co.* for solicitors, and *Sheppard, Pelly, Scott, & Co.* for brokers, have been obtained it is not for us to mention now. Suffice it to say they surely could not have known for whom they have consented to work, and we look to a withdrawal of their names before the prospectus is issued."

The Plaintiffs made affidavits to shew that the statements in the article of which they complained were untrue. They denied specifically that they had any Jewish blood in them; that they had purchased their furniture on the hire system; and that they had any connection with *Harry Hananel Marks*.

The Defendant *Perryman* made an affidavit in which he swore, "The whole of the allegations in the article entitled 'the *Fletcher Mills* of *Providence, Rhode Island*,' complained of by the Plaintiffs, are true in substance and in fact, and I shall be able to prove the same at the trial of this action by subpœnaing witnesses and by cross-examination of the Plaintiffs, and by other evidence which I cannot, and which I submit I ought not to have to, produce on an interlocutory application." "All the copies of the issue of my paper of the 7th of February have been printed and (with the exception of a few copies which I always retain of each issue) have been circulated and sold, and it is not my intention to print, circulate, or sell any more copies."

It was stated by the counsel for the Defendant *Perryman* in reply to the Judge that he was instructed that that Defendant had in stock some forty copies of the *Financial Observer* for the

7th of February, 1891, and that he sold them over the counter when asked for; he admitted that one copy had been sold since his affidavits had been made; he desired to continue the sale, and he refused to give any undertaking either not to sell other copies or not to reprint the article.

It was the practice of the Defendant *Perryman* occasionally to reprint in his paper articles which had appeared in former issues; in each of the issues for the 10th of January and the 7th of February there appeared the reprint of an article headed "Two City Thieves," containing strong expressions against *H. H. Marks* and another person.

The motion was heard before Mr. Justice *North* on the 27th of February, 1891.

Napier Higgins, Q.C., and *Dunham*, for the Plaintiffs:—

It is now settled law that since the *Judicature Acts* the Court has jurisdiction to restrain the further publication of a trade libel, a jurisdiction which it will exercise in a proper case even by way of interlocutory injunction: *Liverpool Household Stores Association* v. *Smith* (1). This libel satisfies all the conditions required by the Court before it takes the strong measure of granting an interlocutory injunction; (1.) on the evidence the libel is false in at least three material particulars; (2.) it is shewn to be calculated to injure the Plaintiffs in their business; (3.) and it is apparent that in all probability the mischief will continue unless an injunction is granted; (4.) no case of privilege can be set up. The article is not like a report of public proceedings. The notice of motion goes further than the relief we are warranted in asking for; we quite admit that there would be great difficulty in restraining more than the particular libel.

[NORTH, J.:—As far as the printer is concerned, assuming against him that he has printed a libel which ought to be restrained till trial, all the purpose will be gained if an injunction is granted against the other Defendant, and the motion as against the printer stands over till trial. On the other hand, if I do not grant an injunction against the publisher, there can be no case against the printer.]

(1) 37 Ch. D. 170.

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The Plaintiffs will not press for an injunction against the printer at this stage.

Cozens-Hardy, Q.C., and *W. E. Vernon*, for the Defendant *Perryman*:—

The jurisdiction to grant an injunction to restrain a libel is one that will be exercised with extreme caution. It will not be exercised where the libel is true, and the Court will not in the present state of the evidence decide the question whether the libel is true or not; and will not grant an injunction till that question has been decided by a jury: *Liverpool Household Stores Association* v. *Smith* (1). The Court will take into consideration the fact that the article complained of is not one written for a particular private end, but is published in a newspaper for a general, and to some extent public, purpose.

Eve, for the Defendant *Allen*.

Napier Higgins, in reply.

1891. Mar. 3. NORTH, J. (after stating the nature of the present application, reading the paragraph above set out from the *Financial Observer* of the 10th of January, 1891, and stating the substance of the article the subject of the action, continued):—

No one can read that article without seeing that it is one of a very serious character, that it directly affects and probably will affect the business of the Plaintiffs, and that it is an allegation which, unless it can be justified at the trial of the action, is one in which a jury would give the Plaintiffs very serious damages.

The Defendant says nothing ought to be done now: that the question is one that ought to be tried by a jury, and that he has a right to have it tried by a jury, which is a far better tribunal than any Judge can be. And so far as that goes I quite agree that a jury is the proper tribunal to decide whether this is or is not the libel it is alleged to be. But the difficulty is this, that I have to consider now whether the publication of this article should or

(1) 37 Ch. D. 170.

should not be continued in the meantime, and that, inasmuch as I have come to the conclusion that, unless I restrain it, it will be continued, I have no course but to consider for myself as well as I can whether it is a case in which an interlocutory injunction should be granted.

The principles of the Court are expressed in several cases, but I think it sufficient to refer to one of them. That is the case of the *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1) before the Court of Appeal. In that case there had been a circular distributed amongst the shareholders in a company reflecting on the conduct of persons interested in it, and Sir *George Jessel* in giving judgment says this (2): "The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel. What I have said is confirmed by *Beddow* v. *Beddow* (3), *Shaw* v. *Earl of Jersey* (4), and *Day* v. *Brownrigg* (5). But the question as to whether the jurisdiction though existing has been properly exercised is quite different. It is a jurisdiction which must be very carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as, for instance, the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the Plaintiff. But, on the other hand, where there is a case to try, and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction." I entirely accept that as binding upon me, and intend to be governed by it.

Now, in the first place, as he points out, it is necessary to consider whether an interlocutory injunction is required, and a little further on, dealing with that part of the case, he says: "The injunction is to restrain future publication. Now the circular in question has been issued to all the shareholders; there is no allegation either on the writ or the statement of claim, or the affidavit of any intention on the part of the defendant to issue any more circulars, nor can I infer such intention, because it is alleged that he has issued the circular to all the shareholders.

(1) 20 Ch. D. 501.
(2) Ibid. 507.
(3) 9 Ch. D. 89.
(4) 4 C. P. D. 120, 359.
(5) 10 Ch. D. 294.

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There is no ground, therefore, for interference. The act is passed, the mischief has been done, if mischief there is, and there is no ground for the intervention of the Court before the trial." If I found that to be the case here I should act on that view and refuse the injunction.

[His Lordship considered the evidence as to the Defendant's intention to continue the sale of the number of his newspaper containing the article complained of and his refusal to give an undertaking, and said:—] It appears to me a case in which there is reason for supposing that the sale will be continued, as I know it has been as matter of fact in one case since action brought. Therefore as far as that goes the inducement held out to the Court to abstain from granting an injunction because there will be no further sales is untrue and misleading.

[After referring to passages in the issues of the Defendant's paper before the Court, his Lordship continued:—] Therefore it is evident what is his course of conduct: that he does when he thinks it right republish over again articles addressed against particular persons or firms whom it is considered desirable by him to attack. That being so and bearing in mind that he declined to give any undertaking as to a repetition of the article, I feel bound to say that I must deal with the case now upon its merits.

Referring again to the case of *Quartz Hill Consolidated Gold Mining Company* v. *Beall* the Master of the Rolls says (1): "In the present case I think the objections to the exercise of the jurisdiction are, at least three." One I have dealt with, that was the question of intention to continue the publication. "In the first place the alleged libel is not proved to be untrue." Then he says this: "As a general rule the plaintiff who applies for an interlocutory injunction must shew the statement to be untrue." Then he goes on to point out that in that case there was no evidence that it was untrue except the evidence of a person on behalf of the plaintiffs, the secretary of the plaintiff company, who said that he believed it to be untrue, and on the other hand the defendant had pledged his oath that he verily believed it was true. In that state of things the Court refused to interfere.

(1) 20 Ch. D. 508.

Now how does the matter stand here? In the present case I have come to the conclusion that, on certain material points the article is shewn to be untrue. I will give my reasons for my conclusion. [His Lordship examined the evidence as to the truth of allegations in the article, and continued:—]

The result is this, that on these three points, first, as to the religion of the Plaintiffs, and the Jews' den; secondly, with respect to the acquisition of the furniture; and thirdly, with respect to *Marks*, I am satisfied on the evidence before me that the article is untrue, in those material respects; and as regards two points—namely, that with regard to the purchase of the furniture, and also upon the point in connection with the Defendant's intention not to sell his paper, I am satisfied that the Defendant is misleading me, and that I cannot attach any weight to what he says in his affidavit as to his belief of what he can do at the trial.

Then in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1), to which I have referred, and which I take as a guide to follow, there was a third point involved—namely, the difficulty of granting an interlocutory injunction where the alleged libel was apparently on its face a privileged communication, and the difficulty there was of going into any question of express malice on an interlocutory application. That point does not arise here, because I do not find it set up that this article in the newspaper is in any sense a privileged communication, and it is unnecessary for the present purpose to inquire whether there is on the face of the article any evidence of express malice.

Then it is said that if I grant an injunction here, I shall simply be doing what will fill the Courts with applications for interlocutory injunctions to restrain libels. I am not alarmed at that prospect, because I do not think my granting an injunction in this case will lead to that result; and, on the other hand, I have this to bear in mind, that, if in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted, whereas it is clear on the authorities that there are cases in which it would be proper to grant it.

(1) 20 Ch. D. 501.

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Then there is this further matter to be considered with reference to the point made, that the matter ought to be tried before a jury. I am satisfied of this, that if the matter was before a jury now, upon the evidence which is before me—that is to say, the evidence of the Plaintiffs uncontradicted, not cross-examined to, and merely resting on the Defendant's evidence in answer to it—I am perfectly satisfied there is not any jury in *England* who would say there should be a verdict for the Defendant in such a case, and, what is more, if they did, I am quite satisfied it is a case in which a new trial would be directed. This, of course, does not touch what may be the case when the action comes to be tried. There may be evidence before the Court then which would satisfy a jury who tries it that the Defendant has made out a justification. I am merely referring to the materials before me, which are all I can look to now in considering what I am to do in the matter. In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned.

What I have said applies to *Perryman* only. There remains the case against *Allen*, the printer. At an early period of the case I pointed out to Mr. *Higgins* that, if I did not grant an injunction against *Perryman*, I could not possibly do so against *Allen*, to which he assented. On the other hand, I pointed this out, that if I did grant an injunction against *Perryman*, all that was required really would be accomplished, to stay the further publication until the trial, and that it was waste of time going into the question whether *Allen* ought or ought not to be restrained by an interlocutory injunction. To that also, I think, after a little protest, Mr. *Higgins* acceded. The result is that it has been unnecessary to consider the case against *Allen*, and I do not grant any injunction against him. As regards him, I shall make his costs costs in the action. I shall make the Plaintiffs' costs costs in the action also, not only as against *Perryman*, which would follow without my mentioning it, but also as against *Allen*, but as to *Perryman* there will be no costs.

I should add this before settling the terms of the order. I was asked to go on by the notice of motion, and in very general terms to restrain all future libels. That is going further than I

think necessary or proper. In point of fact I could not do it, because I should not know how to frame an order in such a way that it would prevent any other improper libels, and at the same time not prevent something that would be legitimate and proper. I therefore decline to interfere as to that second part of the notice of motion.

The form of the order, therefore, that I shall make is this, to restrain, not the Defendants and each of them, but the Defendant *Perryman*, his servants and agents, until trial or further order, from selling, circulating, or delivering or communicating to any person or persons, or permitting to be sold or circulated, or delivered or communicated, to any person or persons, any copy of the *Financial Observer and Mining Herald* of the 7th of February, 1891, containing an article headed "*Fletcher Mills, Providence, Rhode Island*," and from—here I depart rather from the terms of the notice of motion—printing or publishing or selling—repeating the previous words I have used—any copy of the said article, or any extract thereof, or material portion thereof, so far as such extract or portion affects the Plaintiffs, or either of them.

D. P.

The Defendant *Perryman* appealed.

C. A.

The appeal was heard by the full Court of Appeal on the 9th and 10th of April, 1891.

Cozens-Hardy, Q.C., and *W. E. Vernon*, for the Appellant:—

There is no jurisdiction to grant an interlocutory injunction in a libel action when the Defendant deposes that he will be able at the trial to justify the libel. Admitting that there are decisions of the Court of Appeal against this view, the Court as now constituted can overrule them: *Kelly & Co.* v. *Kellond* (1).

The Defendant says that he will be able to prove truth of his statements, and he claims the right to have the question of justification tried before a jury.

[LORD ESHER, M.R., referred to *Hadfield's Case* (2).]

Before the *Judicature Act*, the Court of Chancery had no

(1) 20 Q. B. D. 569, 572, 574, 575.

(2) Law Rep. 8 C. P. 306.

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jurisdiction to restrain the publication of a libel: *Prudential Assurance Company* v. *Knott* (1).

[LINDLEY, L.J., referred to *Mulkern* v. *Ward* (2).]

Fleming v. *Newton* (3).

Before the *Common Law Procedure Act*, 1874 (17 & 18 Vict. c. 125), the Courts of Common Law had no jurisdiction to grant injunctions. That jurisdiction was conferred by sects. 79–82, but, though the words are very general, it ought not to be held that jurisdiction was thereby conferred to grant an interlocutory injunction in a libel action. The effect would be to withdraw from the jury the decision of the question "libel or no libel."

Since the *Judicature Act* it has, no doubt, been held that either division of the High Court has jurisdiction to restrain by injunction the publication of a libel, but it has always been said that an interlocutory injunction will not be granted except under very special circumstances, and that the jurisdiction must be exercised with great caution: *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (4); *Saxby* v. *Easterbrook* (5); *Thomas* v. *Williams* (6); *Hermann Loog* v. *Bean* (7); *Liverpool Household Stores Association* v. *Smith* (8).

In *Saxby* v. *Easterbrook*, the injunction was granted after the libel had been found to be such by a jury.

The principles on which the Court acts as to granting injunctions have not been altered by sect. 25, sub-sect. 8, of the *Judicature Act*, 1873: *Day* v. *Brownrigg* (9); *Gaskin* v. *Balls* (10); *Beddow* v. *Beddow* (11).

The circumstances of the present case are not such as to justify the granting of an interlocutory injunction.

THE COURT said that they were satisfied that there was jurisdiction to grant the injunction, and it therefore became

(1) Law Rep. 10 Ch. 142.
(2) Ibid. 13 Eq. 619.
(3) 1 H. L. C. 363, 376.
(4) 20 Ch. D. 501.
(5) 3 C. P. D. 339.
(6) 14 Ch. D. 864.
(7) 26 Ch. D. 306.
(8) 37 Ch. D. 170.
(9) 10 Ch. D. 294.
(10) 13 Ch. D. 324.
(11) 9 Ch. D. 89.

unnecessary to consider whether the full Court had power to review the decision of a Court of Appeal, consisting of a smaller number of judges.

Napier Higgins, Q.C., and *Dunham*, for the Plaintiffs :—

The circumstances are such as to justify, and indeed to require, the granting of an interlocutory injunction. No real injury will be done to the Defendant if the injunction is granted, and great injury will be done to the Plaintiffs if it is refused. The balance of convenience and inconvenience is in favour of granting the injunction; it would be "just and convenient" to do so. There is really no question to be tried.

Under the present practice a libel action can be tried without a jury.

It is no doubt very important that the liberty of the press should not be interfered with, but that liberty may be abused. The libel of which the Plaintiffs complain is an atrocious one, and it is obviously untrue. It is clearly published for the purpose of blackmailing the Plaintiffs. The argument for the Defendant comes to this, that, however atrocious and untrue the statement may be, the Court is powerless, if the Defendant chooses to swear that he will justify the libel at the trial.

One of the Defendant's affidavits is inadmissible, because it does not shew the grounds of the deponent's belief: Order XXXVIII., rule 3: *Bidder* v. *Bridges* (1).

The Court should be governed in a libel action by the same principles as in other cases in which it is asked to grant an interlocutory injunction; that is, it should take into consideration the balance of convenience and inconvenience.

[LINDLEY, L.J. :—Libel is a new subject-matter.

FRY, L.J. :—May not, therefore, new considerations arise?]

If the Plaintiffs have shewn that *primâ facie* the libel is untrue, they have shewn a *primâ facie* case for an injunction. In every case in which an interlocutory injunction is asked for there must be a *primâ facie* trial and a final trial. In *Coulson* v. *Coulson* (2) the Court considered the evidence.

(1) 26 Ch. D. 1.

(2) 3 Times L. R. 846.

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Cozens-Hardy, in reply :—

In ordinary cases an interlocutory injunction will be granted when there is a case to be tried; in actions for libel an interlocutory injunction will be granted only where there is clearly no case to be tried.

1891. April 21. LORD COLERIDGE, C.J., read the following judgment, in which Lord *Esher*, M.R., and *Lindley*, *Bowen*, and *Lopes*, L.JJ., concurred :—

The Plaintiffs in this case are two gentlemen carrying on business as financial agents under the title of the *Mercantile and General Trust*. The Defendant *Perryman* is the printer and publisher of a paper called the *Financial Observer and Mining Herald*. The Defendant *Allen* is in some way (not material to ascertain) connected with the paper, and he appears to have printed the particular number which contains the matter of which the Plaintiffs complain. In the number of the 7th of February, 1891, appeared the article which the Plaintiffs assert to be a libel upon them, and in respect of which, having issued a writ in the Chancery Division, they applied for and have obtained from Mr. Justice *North* the injunction which we are asked upon appeal to dissolve. [His Lordship read the order appealed from, and continued :—] One point raised in the course of the argument has become immaterial to decide—namely, whether the Court of Appeal, sitting with its full number, can, according to the course and practice of the Court, overrule a Court consisting of three or any other number of members, if the decision which they are asked to review appears to be clearly wrong. It is unnecessary to discuss or to decide this question, because the previous decisions of this Court on the main question before us appear to us to be perfectly correct, and we found our own decision upon them. Two questions only is it really necessary to decide—(1) is there jurisdiction in the Supreme Court to issue an injunction to restrain the publication of an alleged libel, either at all, or before the libel has been adjudged to be such? And (2) is this a case in which, as matter of discretion, the jurisdiction should be exercised, if it exists? The decision

of the first question is, it is manifest, independent of the circumstances of any particular case; the decision of the second entirely depends upon them. As to the first, we are unable to entertain any doubt; the point is clear, and is settled by authority. The authorities, indeed, are few and recent, for very obvious reasons; but they are uniform, and they are clear. Prior to the *Common Law Procedure Act*, 1854, neither Courts of Law nor Courts of Equity could issue injunctions in such a case as this: not Courts of Equity, because cases of libel could not come before them; not Courts of Law, because prior to 1854 they could not issue injunctions at all. But the 79th and 82nd sections of the *Common Law Procedure Act*, 1854, undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was, by the *Judicature Act*, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise by a Court of Common Law till *Saxby* v. *Easterbrook* (1), which was decided in 1878. In that case the injunction was not applied for, nor, of course, granted, till after a verdict and judgment had ascertained the publication to be a libel. That case was acquiesced in; and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction, which has been questioned before us, of granting injunctions on the interlocutory application of one of the parties to an action for libel. Sir *George Jessel* in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (2) distinctly asserted the jurisdiction; and it was considered and established in an elaborate judgment of this Court in *Liverpool Household Stores Association* v. *Smith* (3), in which Lord Justice *Cotton*, affirming indeed the refusal of Mr. Justice *Kekewich* to issue the injunction prayed for in that case, asserted the jurisdiction in plain language, and went on to explain the principles on which, in his opinion, the jurisdiction should be exercised. There have been other examples, but these are sufficient; and we do not

(1) 3 C. P. D. 339. (2) 20 Ch. D. 501.
(3) 37 Ch. D. 170.

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doubt, upon the true construction of the statutes and upon authority, that as matter of jurisdiction Mr. Justice *North's* order might lawfully be made. But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord *Esher*, M.R., in *Coulson* v. *Coulson* (1)—"To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable." In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable. Moreover, the decision at the hearing may turn upon the question of the general character of the Plaintiffs; and this is a point which can rarely be investigated satisfactorily upon affidavit before the trial,—on which further it is not desirable that the Court should express an opinion before the trial. Otherwise, an injunction might be granted before the

(1) 3 Times L. R. 846.

trial in a case in which at the trial nothing but nominal damages, if so much, could be obtained. Upon the whole we think, with great deference to Mr. Justice *North*, that it is wiser in this case, as it generally and in all but exceptional cases must be, to abstain from interference until the trial and determination of the plea of justification. The appeal, therefore, must be allowed, and the order discharged; the costs in this Court and in the Court below to be costs in the cause.

KAY, L.J.:—

I agree with all the members of the Court that, since the passing of the *Common Law Procedure Act*, 1854, by sects. 79, 81, and 82 of that Act, the Courts of Common Law had, and by sects. 16 and 25, sub-sect. 8, of the *Judicature Act*, 1873, the High Court of Justice now has, undoubted jurisdiction to grant injunctions at or before the trial in actions of libel. I also agree that in such actions this jurisdiction should before trial be very cautiously exercised, especially because the questions of libel or no libel, and of the validity of a justification, if pleaded, are eminently matters to be determined by the verdict of a jury. The only point on which I have felt any difficulty is, whether it is expedient or right altogether to discharge the interlocutory injunction which has been granted. The alleged libel is expressed in coarse and abusive language, which would incline any one reading it to the belief that some personal feeling of spite or malignity against the Plaintiffs, and not merely a desire to protect the interests of the public, was among the actuating motives of the Defendant. Some of the most serious allegations in the article are those by which the Defendant associates the Plaintiffs with a person whom he represents to be of infamous character. I know nothing whatever of that individual, except what appears in the evidence before us, and I have no means of judging whether the allegations made against him are true or false. It appears from another page in the same paper that since the 18th of February, 1890, the Defendant has been in the habit of publishing concerning this person accusations expressed in some of the strongest language of his well-furnished vocabulary. The individual so traduced is, it seems, the editor or owner of another

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financial paper published in *London*, called the *Financial News*, and the Defendant's paper states that the Defendant intends to repeat the article against him until some notice is taken of it by the *London* County Council, of which we are told this person is a member, the Incorporated Law Society, the Houses of Parliament, or the police. The article so published, and which the Defendant intends to repeat, calls the person denounced a city thief, a vulture, speaks of his swindles and his nefarious practices, and says, amongst other choice phrases, that there is no phase of the criminal law that has not been scoffed at by him, and that fraud, conspiracy, burglary, and felony have been used to aid his schemes to despoil and hoodwink the public. Now, in the article complained of in this action, it is stated that the Plaintiffs have been lucky enough to ingratiate themselves with this person by offering him inducements to puff one of the companies which they promoted, and that the *Mercantile and General Trust*, which is the style under which the Plaintiffs are carrying on business, is composed of themselves, this man so vilified, and two other persons named *Deakin* and *Campbell*. These statements that the Plaintiffs are carrying on business in partnership or in close association with a man who is described in this way as a swindler and a thief are undoubtedly calculated to damage the Plaintiffs extremely, if not to ruin them. We are relieved from one of the difficulties which occur in most cases of this kind, because counsel have admitted in the argument before us that, if the statements in this article are untrue, it is unquestionably a libel. They say, however, that they intend to plead that the statements are true, and the truth or falsehood of them must undoubtedly be determined at the trial by a jury. They decline to give any undertaking not to repeat these statements before the trial, but they insist that the Defendant has a right to do so. My doubt arises upon the affidavit evidence which is now before the Court. What may be the case at the trial I can only judge at present from that evidence, and I do not wish to say anything which can influence the trial in any way.

In the Plaintiffs' first affidavit, paragraph 4, they deny that they have ever spoken to or communicated with, or had any communication from, the person in question, either directly or

indirectly in any manner at all, or that they have ever had, or have now, any connection, business or private, with him; in paragraph 8 they say that it is not true that they ever had any connection or understanding, upon terms or otherwise, with the *Financial News*, which is his paper, or any representative thereof or person in connection therewith; and in paragraph 9 they say that it is not true that either he or *Campbell* is a member of, or connected with, the *Mercantile and General Trust*, or that *Engel* is a member of the said trust; and in another affidavit filed the same day, the Plaintiffs say that they are the only members of that firm.

Now what impresses me strongly is the mode in which the Defendant *Perryman* answers those affidavits. In paragraph 2 of his affidavit he says he has read copies of them, and in paragraph 4 he states this: The whole of the allegations in the article complained of "are true in substance and in fact, and I shall be able to prove the same at the trial of this action by subpœnaing witnesses, and by cross-examination of the Plaintiffs, and by other evidence, which I cannot, and which I submit I ought not to have to, produce on an interlocutory application"; in paragraph 6 he states that he is not acquainted with the Plaintiffs; in paragraph 8 he repeats that the Plaintiffs have had business connection with the man he vilifies, either personally or through *Engel*, who occupies the same offices as the Plaintiffs in respect of two companies which he names, and which were promoted by the Plaintiffs; and in paragraph 12 he says, in answer to paragraphs 8 and 9 of the Plaintiffs' first affidavit: "I have been informed and verily believe that this person" (naming him) "is personally, or by his agent and stockbroker, *Campbell*, connected with the *Mercantile and General Trust*."

By Order XXXVIII., rule 3, of the Rules of the Supreme Court, 1883, it is provided that "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." Lord *Selborne*, L.C., in *Bidder* v. *Bridges* (1), said: "I do not think this

(1) 26 Ch. D. 8.

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Court can for a single moment give countenance to the notion that any common neglect, if there be such common neglect, of the provisions of that Order can absolve persons from the consequences of disregarding them when the question is raised, as it is here raised, by a person having a right to raise it. That Order requires, in effect, that affidavit evidence as to matters of fact by a person who is not able strictly to prove them, must shew, not only the fact but also the grounds of his belief." To the same effect is the judgment of Sir *G. Jessel*, M.R., in the Court of Appeal, in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1), where the injunction in a libel case was dissolved partly on the ground that the Plaintiffs' affidavit did not comply with this order. Speaking for myself, I entirely agree with this view of the meaning and effect of the order, and think it essential to the ends of justice that it should be strictly observed. In the case now before us the Defendant's answer to the express and categorical denial by the Plaintiffs of any kind of association with the person in question is only met by these statements as to the Defendant's belief, which do not attempt to shew the grounds of his belief, otherwise than by stating that the association is through *Engel* or *Campbell*, and there is no other evidence in support of the Defendant's case on this point. Now, I agree that, in order to justify the Court in granting an interlocutory injunction in such a case, there must be strong *primâ facie* evidence that the statement is untrue. In my opinion, in this state of the affidavits, there is that strong *primâ facie* evidence. If that is so, according to the ordinary practice, the Court should be actuated in granting or refusing the injunction by the consideration of what is commonly termed the balance of convenience and inconvenience. To which side in this case does that balance incline? If this injunction be continued in the whole or in part, it will not prevent the Defendant from protecting the public by any other statements he can legitimately make against the Plaintiffs; it will only prevent him from repeating this particular allegation. Even if at the trial the Defendant should be able to adduce evidence shewing that the Plaintiffs' denial of their association with the person described as

(1) 20 Ch. D. 501.

a swindler is untrue, it is impossible to conceive that the Defendant can be damnified by being restrained meanwhile from repeating it. On the other hand, I can easily believe that this statement, if repeated, as the Defendant admits he intends to do in the interval before the trial, may occasion very great injury, if not ruin, to the Plaintiffs. If it should turn out at the trial of the action that the Plaintiffs' denial on this point is true, and that the Defendant's allegation is false, an irreparable injury may have been done to the Plaintiffs by denying them this relief by interim injunction. I think the true result of the affidavit evidence is, that the Defendant has a suspicion of the Plaintiffs' connection with the person whom he so defames, for which he is not able to allege any substantial foundation. For these reasons I should have granted the injunction, at least as to this part of the libel, and I should have been glad if the Court of Appeal had been prepared to sustain it.

Solicitors for Plaintiffs: *Watson & Watson.*
Solicitors for Defendant: *John Vernon, Son & Co.*

W. L. C.

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[1891 C. 143.]

*Solicitor—Taxation of Bill of Costs—Taxation after payment—Special circumstances—*6 & 7 *Vict. c.* 73, *ss.* 38, 41 [*Revised Ed. Statutes, vol. ix., pp.* 130, 132].

There is no rigid rule as to what kind of circumstances will justify the taxation of a solicitor's bill after payment, but the judge has in each case to determine whether there are special circumstances which make it right to refer the bill for taxation, and if there are special circumstances in the case, the Court of Appeal will not readily interfere with the decision of the Court below that they are sufficient to justify taxation.

THIS was an appeal from an order of Mr. Justice *Kekewich*, in Chambers, directing taxation of the costs of a mortgagee's solicitor on the application of the mortgagor.

Vernon was the owner of property which he had mortgaged to *Kenwood*, who employed *Cheesman* as his solicitor. In September,

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1889, the mortgagee gave *Vernon* the usual six months' notice to pay off the mortgage. On the 6th of October, 1890, the agents of *Vernon* (who was in *Australia*) put up the property for sale by auction, and by the conditions of sale, the 8th of November was fixed for completion. *Cheesman* was present at the sale and knew the time fixed for completion. He had the deeds, and declined to give them up without payment of the mortgagee's costs. On the 24th of November, 1890, he delivered to *Vernon's* agents three bills of costs, amounting together to £45 0*s.* 1*d.*, and on the 18th of December, a further bill for £3 16*s.* 2*d.*, the charges being for notice to pay off mortgage, attendances, and some abstracts. On the same 18th of December, the purchaser's solicitor wrote, pressing for completion, and threatening an action for specific performance. On the 23rd of December the parties met to complete the purchase. Some discussion about the amount of the bills had taken place on the 19th of December between *Vernon's* solicitors and the solicitor acting for *Cheesman*, and it was agreed that *Cheesman* would accept £42, which however *Vernon's* solicitors considered to be too much. At the time of completion a receipt was given:—

"Received this 23rd day of December, 1890, of *W. L. Vernon*, Esq. (*per* Messrs. *Langham, Son & Douglas*), the sum of forty-two pounds, being in discharge of the annexed bills of costs."

"*Phillips & Cheesman,*
"Paid under protest."

Vernon, on the 10th of January, 1891, took out a summons to have the four bills taxed, and on the 16th of February Mr. Justice *Kekewich*, in Chambers, made an order for taxation.

Cheesman appealed.

Everitt, Q.C., and *Gaselee*, for the appeal:—

There were no special circumstances to authorize taxation after payment. It is no special circumstance that a mortgagee will not part with the deeds without payment when he has given the mortgagor ample time to examine his bill: *In re Lacey & Son* (1). Under such circumstances, there is no pressure. There

(1) 25 Ch. D. 301.

must either be pressure or overcharge, or gross overcharge. Here, the items are all small and there is no item of gross overcharge. There was no pressure, ample time having been given: *In re Browne* (1). Protest is immaterial: *In re Harrison* (2). The payment in *In re Tryon* (3) was only conditional.

[KAY, L.J., referred to *In re Drake* (4), and BOWEN, L.J., to *In re Norman* (5), and *In re Boycott* (6)].

MacSwinney, for the Respondent:—

There is now no rigid rule that, in order to justify taxation after payment, there must be pressure and overcharge, or gross overcharge. The Court is to exercise its discretion as to what are sufficient special circumstances: *In re Norman; In re Boycott.* Here the bills were delivered after the time fixed for completion of the purchase, and there was not time to have them taxed before completion. The Appellant says there was no pressure by him; but pressure by anybody else, which makes it necessary to pay at once, comes to the same thing: *In re Browne* (7). The Court below had a discretion as to what are special circumstances, and the Court of Appeal will be slow to interfere with the Judge's exercise of it.

[LINDLEY, L.J.:—The point most against you is, that there appears to have been a discussion about the amount of the bill, and something was struck off. This comes very near to an arrangement.]

Gaselee, in reply.

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, who has ordered taxation of a solicitor's bill after payment. The decision proceeded to some extent on the ground that the payment was made under protest. The bill was the bill of costs of a mortgagee's solicitor, and it was paid by the agent of the mortgagor.

(1) 1 D. M. & G. 322.
(2) 10 Beav. 57.
(3) 7 Beav. 496.
(4) 22 Beav. 438.
(5) 16 Q. B. D. 673.
(6) 29 Ch. D. 571.
(7) 1 D. M. & G. 322, 329, 331.

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In order to authorize taxation after payment there must be special circumstances. The question of special circumstances was considered *In re Dickson* (1), where taxation was ordered though there was no pressure and no overcharges which could be considered as amounting to fraud. The Court has got out of the narrow groove laid down by some of the earlier cases, which decide that there must be pressure and overcharge, or overcharge so gross as to amount to fraud, and it is now settled by *In re Boycott* (2) and *In re Norman* (3), that each case must stand on its own circumstances. The Court cannot lay down a hard and fast rule not imposed by the Act; it must judge in each case whether there are special circumstances such as to make it right and reasonable that the bill should be taxed although it has been paid. The circumstances of the present case are these: The property was in mortgage, and the mortgagee called in his money. The mortgagor agreed to sell, and put up the property for sale. It was sold, and the time fixed for completion was the 8th of November, 1890. The mortgagee's solicitor knew of the sale, and the time fixed for completion. The purchaser pressed for completion, and threatened an action for specific performance. After the day fixed for completion the mortgagee's solicitor delivered his bills of costs. Three were delivered on the 24th of November, and the last, a small one, on the 18th of December. The total amount of the bills was £48 16*s.* 3*d.* The purchase was completed on the 23rd of December. The person acting for the mortgagor looked at the bills and took some objections to them; the solicitor struck off £6 16*s.* 3*d.*, and the reduced amount, £42, was paid, and a receipt given in these terms: "Received this 23rd day of December, 1890, of *W. L. Vernon*, Esq. (*per* Messrs. *Langham, Son, & Douglas*), the sum of £42, being in discharge of the annexed bill of costs. *Phillips & Cheesman.* Paid under protest." Now, what does payment, "under protest" mean? for it must mean something. I think its effect is to negative satisfaction with the bill; it does not confer a right to have the bill taxed, but reserves that right if it exists. Mr. Justice *Kekewich* thought that there were suffi-

(1) 8 D. M. & G. 655. (2) 29 Ch. D. 571.
(3) 16 Q. B. D. 673.

cient special circumstances to make it right to direct taxation. I am not sure that I should have thought so if the matter had come before me in the first instance, but I cannot say there were no special circumstances, and cannot therefore come to the conclusion that Mr. Justice *Kekewich* was wrong. The case is very like *In re Tryon* (1), and it would be a bad precedent to encourage appeals in matters of this nature.

BOWEN, L.J.:—

Let us first see what the statute 6 & 7 Vict. s. 73, c. 41, says: "The payment of any such bill as aforesaid shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same . . . ." This gives the judge a wide discretion. If there had been here nothing that could reasonably be considered a special circumstance, it would have been our duty to reverse this order. But there certainly were special circumstances, and the Court of Appeal ought not lightly to interfere with the discretion of the judge as to whether they were sufficient.

KAY, L.J.:—

I agree. I feel the impolicy of encouraging appeals in small matters of taxation. I entertain the same doubt as the Lord Justice *Lindley*, whether the special circumstances here were such as would have induced me to direct taxation, but Mr. Justice *Kekewich* has thought them sufficient, and we ought not to interfere with the discretion of the judge below except in a very strong case.

Solicitors: *Kingsford, Dorman, & Co.*; *Langhams*, agents for *Langham, Son, & Douglas, Hastings.*

(1) 7 Beav. 496.

H. C. J.

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NORTH, J.
March 6.
C. A.
April 22.

SALOMONS *v.* KNIGHT.

[1891 S. 700.]

Libel—Interlocutory Injunction.

The Defendant having published a document containing charges of fraud, perjury, and conspiracy against the Plaintiff, the Plaintiff brought an action for libel, and recovered judgment for £1000 damages, of no part of which could he obtain payment. The Defendant continued to publish documents repeating the same charges, and the Plaintiff commenced the present action for an injunction and damages:—

Held, by *North*, J., and by the Court of Appeal, that though the Court had jurisdiction to grant an interlocutory injunction to restrain further publication of the libel, there was in this case no reason to apprehend any such danger of injury to the Plaintiff in person or property as to make it right to grant one.

IN or about June, 1883, the Plaintiff agreed with the Defendant to purchase for £4000 the Defendant's interest in certain houses in the city of *London*, and to pay for the fixtures and fittings at a valuation. Pending the completion, the Plaintiff made payments on account, and a dispute arose as to the amount of the balance payable on completion. By an order of the Queen's Bench Division, on the 10th of December, 1884, the matters in dispute were referred to arbitration. On the 24th of January, 1885, the arbitrator made an elaborate award, directing the sale to be completed within seven days, and directing the Plaintiff on completion to pay to the Defendant £368 16*s.* 9*d.*, the balance remaining due in respect of the £4000 and of the valuation of fixtures and fittings. The Plaintiff, a few days afterwards, paid the £368 16*s.* 9*d.*

The Defendant insisting that he had been induced to enter into the contract by fraud, and that the award had been improperly obtained, the Plaintiff agreed to a further reference to arbitration, and all matters in dispute were referred to the arbitration of Mr. *Meadows White*, Q.C., and Mr. *Brooker*, or, if they did not agree, of an umpire to be named by them. They did not agree, and on the 22nd of December, 1887, the umpire made his award, by which he awarded that there should be paid by the

Plaintiff to the Defendant, for the Defendant's share of certain profits mentioned in the agreement, the sum of £852. That no sum ought to be paid by the Plaintiff to the Defendant by way of damages for the exclusion from before the first arbitrator of a certain letter. That the Plaintiff and the clerk of the Defendant's solicitor did not between them concoct the wording of the agreement for sale and purchase, and that the Defendant was not induced to sign it by such representations as he alleged. That £86 and no more ought to be paid or allowed to the Defendant by the Plaintiff in respect of certain rent which had been erroneously debited against the Defendant.

The Plaintiff in the following month paid to the Defendant the sums so awarded to him.

In February, 1888, the Defendant applied at *Bow Street* for a summons against the Plaintiff, the Defendant's former solicitor, and the managing clerk of the solicitor, for a conspiracy to defraud the Defendant in the above matters. The application was twice refused.

In March, 1888, the Defendant sent to the Plaintiff's solicitor a copy of a document published by the Defendant, and intituled "An Appeal to the Public for Aid", by which he alleged that his signature to the contract had been obtained by false representations; that the contract was drawn in the interest of the Plaintiff, by collusion between the Plaintiff and the Defendant's solicitor and his managing clerk; that the Plaintiff had got possession of the Defendant's property without paying for it; that the Plaintiff had committed wilful and corrupt perjury before the arbitrator in order to defraud the Defendant; and that the Plaintiff's solicitor had deliberately aided him in committing the perjury; and that the first award had been obtained by fraud and conspiracy to defraud.

The Plaintiff at once commenced an action for libel. The Defendant pleaded that the statements in the "Appeal" were true in substance and fact, and counter-claimed for the balance of his purchase-money, which he alleged to be £3009 1*s.* 3*d.*, and damages which he laid at £6000, in respect of the Plaintiff's improperly and fraudulently obtaining possession of the property.

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The action was tried by Mr. Justice *Cave* with a special jury, and on the 28th of November, 1889, judgment was given for the Plaintiff for £1000 damages, and the counter-claim was dismissed. The Plaintiff was unable to obtain payment of any part of the damages.

Shortly after this the Defendant commenced sending to the Plaintiff letters and communications, in which the above charges were repeated. In January, 1891, the Plaintiff received by post a bundle of printed documents, addressed in the Defendant's handwriting, on the reverse side of which, and visible to all persons through whose hands the packet might pass, was printed: "Manifesto and public demand of *J. Knight* to Mr. *L. Salomons* with reference to his having unlawfully obtained possession of a valuable property by fraud, &c. (*vide* his own accounts and other documentary evidence). And, furthermore, defeated justice and gained a fictitious verdict by illegal suppression of documents and gross misrepresentations, &c., in a spurious action which he commenced, but could not set down for trial, after utilizing and abusing the rules and process of the public Courts to delay and avoid doing so (*vide* epitome and open challenges). Note.—This public demand is made and justified by reason of a certain arbitration having been unwarrantably set forth and falsely represented at two public Courts as an excuse for and exoneration of certain illegal and criminal acts by which I have been absolutely ruined (*vide* my public challenge to his solicitor, &c., more fully referred to herein).—*J. K.*"

The "Manifesto," and some other documents which the Defendant circulated with it, contained a repetition of the charges which had been dealt with in the libel action.

On the 17th of February, 1891, the Plaintiff commenced the present action to restrain the Defendant from further circulating the libellous documents, and for damages, and moved for an injunction. The motion was heard before Mr. Justice *North* on the 6th of March, 1891.

Cozens-Hardy, Q.C., and *Frank Watson*, for the motion.

John Black, for the Defendant, was not called upon.

NORTH, J.:—

In this case I see no reason to interfere by way of interlocutory injunction. I have not heard the Defendant, and therefore I do not form any opinion about his case, and I shall not say more than this, that after reading the documents that have been published by the Defendant, they seem to be, so far as I can form an opinion without hearing him, unjustifiable to a degree. But then, on the other hand, I do not find anything which shews the slightest suggestion by any person—the Plaintiff or any other person—that any one who saw these documents would pay the slightest attention to them or attach the slightest weight to them.

Under these circumstances, it is open to the Plaintiff if the charges are such as he says (and he says he cannot recover pecuniary damages from the Defendant) to take proceedings by indictment against the Defendant; but I do not see any such immediate and pressing injury to person or property threatened by the Defendant's proceedings as to make it desirable or right that I, sitting in the Chancery Division, should interfere to stop by interlocutory injunction the steps the Defendant has thought proper to take.

I think this is a case where the costs should be costs in the action, and I make that order.

C. A.

The Plaintiff appealed. The appeal was heard on the 22nd of April, 1891.

Cozens-Hardy, Q.C., and *Frank Watson*, for the appeal:—

This case is distinguished from *Bonnard* v. *Perryman* (1), by the fact that the libels which the Defendant issues have been found on the trial of the former action to be libels, and heavy damages have been given in respect of them, yet the Defendant goes on repeating them. It is not disputed that the Court has jurisdiction, and if ever there can be a case in which that jurisdiction ought to be exercised the present is one.

John Black, for the Respondent, was not called upon.

(1) *Ante*, p. 269.

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LINDLEY, L.J.:—

The judgment of Mr. Justice *North* in this case is very short, and I will read it. He says: "In this case I see no reason to interfere by way of interlocutory injunction. I have not heard the Defendant, and therefore I do not form any opinion about his case, and I will not say more than this, that after reading the documents that have been published by the Defendant, they seem to be, so far as I can form an opinion without hearing him, unjustifiable to a degree; but then, on the other hand, I do not find anything which shews the slightest suggestion by any person—the Plaintiff or any other person—that any one who saw these documents would pay the slightest attention to them or attach the slightest weight to them. Under those circumstances, it is open to the Plaintiff, if the charges are such as he says (and he says he cannot recover pecuniary damages from the Defendant), to take proceedings by indictment against the Defendant, but I do not see any such immediate and pressing injury to person or to property threatened by the Defendant's proceedings as to make it desirable or right that I, sitting in the Chancery Division, should interfere to stop by interlocutory injunction the steps the Defendant has thought proper to take." I agree with those observations. So far as I can judge, the conduct of the Defendant is entirely without justification and without excuse, and if he does not take care he may find himself in gaol. But I agree with Mr. Justice *North* (and I think our decision is perfectly consistent with what we said yesterday in *Bonnard* v. *Perryman* (1)), that there is no reason whatever to suppose that any injury is being done to the Plaintiff either in person or property. For these reasons, I think an interlocutory injunction ought not to be granted, not because we have the slightest sympathy with the Defendant, or think his conduct justifiable, but for the reasons I have given. We think the costs should be costs in the cause.

BOWEN, L.J.:—I am of the same opinion.

KAY, L.J., concurred.

Solicitors: *Watson, Sons, & Room; John Westcott.*

(1) *Ante*, p. 269.

H. C. J.

In re VIOLET NEVIN (AN INFANT).

C. A.
1891
CHITTY, J.
Jan. 21, 22, 29.
C. A.
April 24.

Infant—Guardian—Religious Education—Abandonment of Father's Right—Antenuptial Agreement as to Religion of the Children—Wishes of Deceased Parents—Costs.

Before the marriage of a Protestant with a Roman Catholic wife, the husband and wife signed an undertaking that all the children of the marriage should be brought up Roman Catholics. There was only one child of the marriage, a girl, who with the father's consent was baptized as a Roman Catholic. When the child was about three years old, the father, who was in destitution, died at the house of Miss *M.*, a Protestant cousin of the wife, who was in good circumstances and had been kind to the family. The father, on his death-bed had commended his wife and child to her, and appointed no guardian. Soon after his death, the child, with the consent of her mother, who was statutory guardian, went to live with and was maintained by Miss *M.*, with whom she remained till she was seven years old, and there was a strong attachment between them. The mother then died, without appointing a guardian. After her death, her brother, who was a Roman Catholic, insisted that the child should be brought up a Roman Catholic, took her away from Miss *M.* by force, and sent her to *America*, whence she was brought back under *habeas corpus* proceedings instituted by *N.*, a Protestant brother of the father. Nothing had been said to Miss *M.* by either father or mother as to the religious education of the child:—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.), that, as the child had no parent or guardian the Court had only to consider what was for her welfare, having due regard to the wishes of the father as to religious education—that the antenuptial agreement was not binding on the father, and that, though he acted during his life on the view that the child was to be brought up as a Roman Catholic, he was at liberty to change his mind, and that it could not be inferred that in the events which had happened he would have wished the child to be taken from Miss *M.*, in order that she might be brought up a Roman Catholic—a course, which, in the opinion of the Court, would not be for her benefit. Miss *M.* and *N.*, were therefore appointed guardians, and the child was delivered to Miss *M.*, with liberty to bring her up as a Protestant.

ADJOURNED SUMMONS.

This was an application for the appointment of guardians of a penniless orphan infant, which raised two questions, first, who ought to be appointed guardians; and secondly, whether any directions ought to be given as to the religion in which the child should be brought up. The facts were briefly as follows:—

The father of the infant, a girl, was a Protestant, the mother

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a Roman Catholic; previously to their marriage a printed agreement in the following terms was signed by both of them: "We, the undersigned, do hereby each of us solemnly promise and engage that all the children of both sexes who may be born of our marriage shall be baptized in the Catholic church and shall be carefully brought up in the knowledge and practice of the Catholic religion." The father at the same time signed a document, "I, the undersigned, do hereby solemnly promise and engage that I will not interfere with the religious belief of Miss *Conolly*, my future wife, and that I will allow her full and perfect liberty to fulfil all her duties as a member of the Catholic religion." The infant was born in March, 1883, and was baptized privately by a Roman Catholic priest, and afterwards publicly in a Roman Catholic church, the sponsors being also Roman Catholics. The parents lived at Liverpool. About the end of 1885, the father being then in ill health and without the means of supporting his wife and child, Miss *Martin*, a Protestant, and a cousin of the wife, offered them a home with her at *Kingstown*; this offer was accepted, and Miss *Martin* came over to *Liverpool* in January, 1886, and took the child back with her. The father and mother followed in February, but shortly after their arrival at Miss *Martin's* house, the father on the 4th of March, 1886, died intestate. Miss *Martin* stated that on his deathbed he commended his wife and child to her care. The father was buried in a Protestant cemetery. After the father's death the mother and child continued to live with Miss *Martin* till July, 1886, when they returned to *Liverpool* on a visit to the mother's brother *James Conolly*, a Roman Catholic. Subsequently Miss *Martin* informed *James Conolly* that she was most desirous of having the child to bring up, and in September, 1886, the child was taken over to *Kingstown* by *James Conolly's* wife, with the consent of the mother, who was then statutory guardian, and with whom Miss *Martin* was on very friendly terms, constantly writing to her and sending her money, though there were reasons why she did not wish to offer her a home. No stipulation was made as to the child's religious education. In October, 1889, the mother died intestate in the workhouse at *Liverpool*. The child lived with Miss *Martin* from September, 1886 till June, 1890, and was

maintained, clothed, and educated solely by her; and there was evidence that a strong affection existed between Miss *Martin* and the child.

In the early part of 1890, *James Conolly* wrote to Miss *Martin* urging that the child ought to be brought up a Roman Catholic, and a correspondence ensued in which he claimed the custody of the child. Miss *Martin* refused to give her up, and in June, 1890, *James Conolly* crossed over to *Kingstown*, and forcibly took the child from Miss *Martin's* custody and sent her off under the charge of the stewardess of the steamer to a religious sister in *New York*, who sent her on to *California*. *James Conolly* was subsequently compelled to bring the child back to *England* under *habeas corpus* proceedings, which had been instituted against him by one *William Nevin*, the child's paternal uncle.

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James Conolly now applied to have himself appointed guardian in conjunction with some or one of the following persons, strangers in blood to the infant, the Roman Catholic bishop of *Liverpool*, a Roman Catholic solicitor, and the lady superior of a religious house. *James Conolly*, if he were appointed, undertook to bring the child up with his own family, to educate and clothe her, and do the best he could for her. The other applicants also undertook, if they or any of them were appointed, to take every care for the child's maintenance and education, and to find her a suitable situation when she was sixteen years of age. The Respondents to this application were *William Nevin* and Miss *Martin*.

Miss *Martin* undertook, if she were appointed, not only to maintain, clothe, and educate the child, but upon her own death to make a provision for her of £100 a year for life; she, however, declined to accept the guardianship, if a condition were imposed that the child should be brought up as a Roman Catholic.

Costelloe, for the Applicants:—

The father, by the antenuptial agreement, abandoned his right to have his child brought up in his own religion, and by this agreement and his subsequent conduct has indicated an intention that the child shall be brought up in the Roman Catholic religion: *Hill* v. *Hill* (1). Though the antenuptial agreement

(1) 31 L. J. (Ch.) 505.

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is not binding, still it will have weight with the Court in considering whether the father has abandoned his right to educate the child in his own religion: *Andrews* v. *Salt* (1). If the mother were still alive, there would be less difficulty, and I submit that the Court should have regard to her wishes as to the child's education. Why should her death make any difference in this respect, when you consider the fact that the child has been baptized a Roman Catholic, and as I contend, up to this time has continued in that faith? She has not been rebaptized a Protestant. Assuming the Court does not think *James Conolly* a proper person for guardian, and should prefer the Protestant relative, I submit that a direction ought to be given, as was done in *Hawksworth* v. *Hawksworth* (2), that the child should be brought up in the Roman Catholic faith.

[*In re Agar-Ellis* (3) and *In re Scanlan* (4) were also mentioned.]

T. Willes Chitty, for the Respondents:—

Assuming that the father has, by his acts, abandoned his right to have the child brought up in his own religion, that does not give any other religious body a right to claim her. All that has to be considered is the happiness and welfare of the child: *Andrews* v. *Salt*. The present case is entirely covered by the principles laid down in *Andrews* v. *Salt*. The child cannot yet have imbibed any of the particular doctrines of the Roman Catholic religion, so that it would be dangerous to change her religious training; neither would it be advisable for the Court to have an interview with her, for the reasons given in *Hawksworth* v. *Hawksworth*. Miss *Martin* very properly declines to accept the guardianship if the direction suggested by the Applicant is imposed. It is clearly for the child's benefit to be entrusted to Miss *Martin*, and be brought up by her in her own religion as a Protestant.

Costelloe, in reply:—

The father has clearly devoted this child to the religion of the

(1) Law Rep. 8 Ch. 622.
(2) Ibid. 6 Ch. 539.
(3) 10 Ch. D. 49.
(4) 40 Ch. D. 200.

mother; it is the right of the infant to be educated in the religion in which it has been baptized, and whatever order is made as to guardianship, I submit that there ought to be a direction that this child be brought up in the Roman Catholic faith.

Jan. 29. CHITTY, J. (after stating the questions raised by the summons, the age and position of the infant, and the fact that neither the father nor the mother had appointed any guardians, continued):—

In these circumstances the Court, in the exercise of its ordinary jurisdiction, has a discretion in the selection of the persons to be appointed guardians. In the exercise of this discretionary authority, the Court, according to its ordinary practice, gives a preference to the nearest blood relations, and does not appoint strangers when fit persons are to be found among the relations. But although the claims of relations are duly considered, they have no actual legal or equitable right to the guardianship. In the choice of guardians, where there are none, the Court endeavours to give due weight to all the circumstances of the case, the guiding principle being the welfare of the child in the widest sense of the term. Keeping this principle steadily in view, it endeavours to secure in the office of guardians persons who are likely to act harmoniously together. The nearest relations seeking guardianship of this infant are *William Nevin*, the only paternal uncle, *James Conolly*, a maternal uncle, and Miss *Martin*, a first cousin of the mother. *James Conolly*, by whom the summons has been taken out, proposes that he should be appointed guardian, and that there should be associated with him some or one of four persons named, strangers in blood to the infant. *William Nevin* and Miss *Martin* propose themselves. The question here arises whether *James Conolly* is a fit person to be appointed guardian. [His Lordship then stated the facts as above, and certain other facts as to *James Conolly's* conduct in forcibly removing the child, and as to the subsequent proceedings in the Queen's Bench Division for a *habeas corpus*, coming to the conclusion that *James Conolly* was not a fit person to be entrusted with the guardianship of this

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child, and continued :—] The case for appointing the strangers whom he proposes as associates, necessarily falls to the ground with him, unless the Court is constrained by the force of the argument on religious grounds to have recourse to them. Not a word, however, is to be said against these persons, who, from motives of religion and charity have expressed their willingness to take upon themselves, with *James Conolly*, the care of the orphan until she is sixteen years of age, and then to find her a fitting situation. I now proceed to consider the question of appointing the respondents, still apart from the religious questions. There is satisfactory evidence of the respectability and the fitness of Mr. *Nevin* and Miss *Martin*. The case for appointing Miss *Martin* appears to me to be not only strong but overwhelming. In addition to the facts already stated, it appears that the mother, before her marriage, was a constant visitor at the house of Miss *Martin's* mother, that after the marriage the father and mother were on intimate terms with her, that she stayed with them on several occasions, that in 1883, the year in which the child was born, she nursed the mother in an illness, and she almost entirely clothed the child from her birth. Notwithstanding that she was unable to provide a home for the mother after her return to Liverpool in July, 1886, Miss *Martin* remained on most friendly terms with the mother, constantly writing to her and sending her money. Further she offers, if she is appointed guardian, to undertake not merely to maintain, clothe and educate the child, but upon her own death to make the handsome provision for her of £100 a year for life. Here, however, the question of religion arises. Miss *Martin* declines to accept the guardianship if a condition is imposed that the child shall be brought up as a Roman Catholic. In this, I think, she is highly to be commended. It is an unmistakable sign of her integrity and candour. Being herself a sincere Protestant, she will not ostensibly undertake a duty which she feels she cannot honestly discharge if the child is living with her under her guardianship. The Court has in some cases (such, for instance, as *Hawksworth* v. *Hawksworth* (1)), considered itself bound to impose such a condition. Perfectly loyal compliance

(1) Law Rep. 6 Ch. 539.

with it, when the religious belief is strong, must be always very difficult, and especially so in the case of a woman and a girl, between whom daily intercourse is more constant, and the domestic ties are closer, than between a man and a boy. Such a condition tends to estrange the child from the guardian, and as years advance to raise a barrier between them, particularly in the inner life, and it is calculated slowly to impair the beneficial influence which the guardian ought to exercise in the child's best interests.

I now come to the question whether the Court ought to give a direction that the infant should be brought up in the Roman Catholic faith. *Primâ facie* a child ought to be brought up in the father's religion. The father was a Protestant, and consequently, if there were no other circumstances this child ought to be educated as a Protestant. But there are two circumstances which were strongly relied upon by Mr. *Conolly's* counsel as reasons for educating the child as a Roman Catholic—first, an antenuptial promise; and, secondly, the child's baptism. The father and mother were married in a Roman Catholic church, and, in order to obtain a dispensation for the marriage, they were required to sign and did sign a printed document. There being no evidence to the contrary, I am bound to presume, as I do, that the father signed it voluntarily. It contains a promise by the father and mother, not one with the other, but, as I read it, to the Roman Catholic Church, that the children of the marriage shall be brought up in the religion of that Church. Now it is clear law, and it had been decided by the Court of Appeal at least ten years before this document was signed, that such a promise does not create a legal or enforceable contract on the father's part (see *Andrews* v. *Salt* (1)). A father cannot bind himself conclusively by contract to exercise in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own. The child being ill, was baptized privately by a Roman Catholic priest and afterwards publicly in a Roman Catholic church. The godfather and godmother were Roman Catholics, the godmother being the maternal aunt, then in *America*, acting by proxy. These facts unquestionably indicated an intention on the part of the father

(1) Law Rep. 8 Ch. 622.

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that the child should be brought up in the religion of the mother (see *Hill* v. *Hill* (1)). But it is incontestable in point of law that he was at liberty to change his mind. The change of mind may be shewn by the subsequent declarations and conduct of the father; and the right of the father, and of a guardian appointed by him, may be wholly lost by conduct. In *Andrews* v. *Salt* (2) the father expressly directed by his will that the child should be brought up as a Roman Catholic, and appointed his brother, a Roman Catholic, to be guardian. After the father's death the child had been left for several years in the care of Protestant relations without interference on the part of the guardian. When the guardian intervened, the child, a girl, was about nine years of age, and when the Court saw her she was two years older. The Court was of opinion that the child had not acquired the distinctive principles of the Church of England to such an extent as to make it wrong and cruel on that account that she should be educated in the Roman Catholic religion. But the Court held that the advantage of being educated in the religion of the Church of *England* depended on its being made out that it was for the child's advantage to remain with her Protestant relations, with whom she could not remain if she were to be brought up as a Roman Catholic. That case, in many of its circumstances, closely resembles the present. It was decided that the child should remain with the Protestant relations, and be brought up in their religion. Now, in the case before me, I have to throw into the scale against the antenuptial promise and the baptism the following important facts. The father and the mother both knew that Miss *Martin* was a sincere Protestant. Before his death he intrusted her with the child; on his death-bed he commended the child as well as the mother to her care. Although this was not a legal appointment of Miss *Martin* to be guardian, it was a solemn expression of a dying wish. True it is that nothing was said about the religious education of the child, but is it reasonable to suppose that he intended that the child should be brought up by a Protestant lady as a Roman Catholic? I think not. He had nothing in the world to leave for the support of his widow and child; he knew that the child would

(1) 31 L. J. (Ch.) 505. (2) Law Rep. 8 Ch. 622.

be entirely dependent on Miss *Martin's* bounty; he expected, and his expectations were justified by the event, that the child would live with, and be brought up by Miss *Martin*, a Protestant. It is an element which cannot be lost sight of in this case that the father himself was a Protestant, a fact that renders it less difficult to draw the inference that he had changed his mind as to the religious education of his daughter. Then there is also the uniform conduct of the mother. After her husband's death she left the child entirely under the charge of Miss *Martin*. She made no stipulation, one way or the other, as to the child's religious education. After the child was sent back to her, in September, 1886, Miss *Martin* says that she considered herself at liberty to bring up the child as a Protestant. Although nothing was said on the subject, this appears to me to have been a reasonable conclusion. Accordingly Miss *Martin* took the child with her to her own church, and in other ways instructed her as a Protestant. I do not presume that the child has acquired any distinctive notions in regard to the Protestant and the Roman Catholic religions. Her religious feelings probably do not go beyond those matters of belief which are common to most Christians. I have not had an interview with the child, for the reasons given by Vice-Chancellor *Wickens* and approved by the Court of Appeal in *Hawksworth* v. *Hawksworth* (1). An interview with a child of such tender years—there is no ground for suggesting that she is precocious—would be purely formal. There is, moreover, the risk of the child being under the impressions created by the persons with whom she has last been associated. Now, when I am speaking of the mother's conduct, it must not be supposed that I have lost sight of the decision in *In re Scanlan* (2), where it was held that the mother becoming after the death of the father guardian by the statute, is not entitled to change the religious education of the child from that which the father has imposed. There are several passages in the judgment of the Court of Appeal in *Andrews* v. *Salt* (3), bearing closely on this case, but they are too long to quote. Acting in accordance with the

(1) Law Rep. 6 Ch. 539. (2) 40 Ch. D. 200.
(3) Law Rep. 8 Ch. 622.

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principle of that case, I have come to the conclusion, after duly weighing the circumstances, that I am free to consult the best interests of the child, and that it is most for her well-being in the future that she should be intrusted to the charity of the lady whose kindness she and her parents have already experienced. Dealing with the case as I think I ought upon the facts as they stood in June, 1890—the date of the child's abduction by *Conolly*—it would, in my opinion, be an unnecessary cruelty to the child to drag her away from Miss *Martin*, the friend and benefactress of herself and her dead father and mother, and to hand her over to strangers, in order that she may be brought up as a Roman Catholic. I may add that on these religious questions relating to infants the Court stands absolutely neutral between the Roman Catholics and the Protestants. The order will be to appoint Mr. *William Nevin* and Miss *Martin* guardians of the person of the infant, and it will embody Miss *Martin's* undertakings. The actual custody of the child will be committed to her, with liberty to bring up the child as a Protestant. An application can be made to me in my private room during the course of the day by the guardians whom I have appointed with respect to the child's place of residence. As to the costs of the application before me, I order Mr. *Conolly* to pay to the Respondents their costs of the contest as to his fitness for the guardianship. As to the rest of the costs, there being no fund for their payment, and as the application is made use of for the purpose of appointing guardians, it would be wrong to order Mr. *Conolly* to pay them. With the above exception, I must leave Mr. *Conolly* and the Respondents to pay his and their own costs of the proceedings before me.

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The infant, by Mr. *Conolly* as next friend, appealed from this decision. The appeal was heard on the 24th of April, 1891.

Murphy, Q.C., *Costelloe*, and *W. H. Stevenson*, for the appeal:—

We contend that whatever rights the father had to have the child brought up in his own religion he abandoned, as in *Andrews* v. *Salt* (1), and determined that the child should be

(1) Law Rep. 8 Ch. 622.

brought up a Roman Catholic. The principles applicable to the case are laid down in *Hawksworth* v. *Hawksworth* (1). *Chitty*, J., attached too much importance to the fact that the father on his death-bed commended his wife and child to Miss *Martin*. That was nothing more than a request to her to befriend them as she had done before, and had no reference to religious education. The rule of the Court is, that the wish of the father governs, if he has expressed a wish. If he has not, then the Court assumes a wish that the children should be brought up in his own religion: *In re Scanlan* (2). The principle is not that children are to be brought up in the father's religion, but in the religion in which he chooses them to be brought up.

[KAY, L.J.:—Do you say that if a father wished his children to be brought up Mohammedans, the Court would attend to that wish?]

No; a distinction has always been made between Christianity and other religions. Here, the father, by his acts, shewed the full determination that the child should be brought up a Roman Catholic; he had the child baptized as a Roman Catholic, with Roman Catholic sponsors, and never did anything to shew a change of intention.

[BOWEN, L.J.:—If we look at the circumstances at the time of his death, the mother and child destitute, and Miss *Martin* taking care of the child, is it not probable that he would change his mind—for being a Protestant he cannot have thought Protestantism a bad thing?]

We rely on the father's public acts: *Hill* v. *Hill* (3), and the absence of any evidence of change of intention.

[LINDLEY, L.J.:—The case is peculiar in this that there is no father, no mother, no guardian, no direction by the father as to the religious education of the child. What can we look to but the child's benefit?]

We contend, that the father sufficiently expressed his wish that the child should be brought up a Roman Catholic.

(1) Law Rep. 6 Ch. 539. (2) 40 Ch. D. 200, 207.
(3) 10 W. R. 400; 31 L. J. (Ch.) 505.

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Farwell, Q.C., and *T. Willes Chitty*, for the Respondents, were not called upon.

LINDLEY, L.J.:—

This is an appeal from an order of Mr. Justice *Chitty*, by which Mr. *Nevin* and Miss *Martin* are appointed guardians of the person of the infant *Violet Nevin*; and, Miss *Martin* having undertaken to maintain, clothe, and educate the infant, and in the case of her (Miss *Martin's*) death, to provide her with an income of £100 a year for life, it is ordered that the custody of the infant be committed to her, and with liberty to bring her up in the Protestant religion. This is one of those painful cases in which two sets of persons with different religious views fight for the custody of an infant. The case is peculiar. The child is a little girl of eight, and has neither father, mother, nor guardian. She has relations on both sides. Her father died in March, 1886, at which time she was about three years old, and he made no appointment of a guardian. He was in pecuniary trouble owing to failing health, and at his death, he and his wife and child were staying with Miss *Martin*, a cousin of his wife, who was in comfortable circumstances and had befriended the family. The father on his deathbed, commended his wife and child to her. The wife died in 1889, when the child was about six years old, and made no appointment of a guardian. From September, 1886 till the death of the mother, the child, with the consent of the mother, lived with and was maintained by Miss *Martin*. This continued till 1890, when Mr. *Conolly*, the mother's brother, claimed to have the custody of the child; and this claim being resisted, he took her by force, and thought it his duty to send her off to *New York*, whence she was forwarded to *San Francisco*, where she fell into very kind hands, those of a maternal aunt. She was brought back to this country under *habeas corpus* proceedings taken by Mr. *Nevin*, her father's brother, and the question now is, who is to have the custody of her.

There is no father, no mother, no guardian, so there is no one having a right to the custody of the child. Anybody may take out a summons for the appointment of a guardian, and the Court will protect the interests of the child. The paramount consi-

deration is the child's welfare. This case has been fought as if the mother's relations had a right to have the child brought up a Roman Catholic. They have no such right. The father was a Protestant, the mother a Roman Catholic. Before their marriage a document was signed by them both, engaging that the children of the marriage should all be brought up Roman Catholics. Whether it is to be regarded as a contract between the husband and wife I do not know, it rather looks like a condition imposed by a higher power. [His Lordship here read the document, and also the further document signed by the husband.] On the 6th of March, 1883, the child was born, and on the 16th she was privately baptized by a Roman Catholic priest; and afterwards, on the 12th of April, was publicly baptized at a Roman Catholic church as a Roman Catholic, the sponsors all being Roman Catholics. Those are the facts which are relied upon as a ground for taking her from the house where she was placed by her father and left by her mother. The way in which it is put is, that there was a strong expression of a wish by the father that the child should be brought up a Roman Catholic. But there is no reason to suppose that the father's attention was ever directed to such events as those which have actually happened, and no reason to suppose that if he had been living he would have wished the child to be taken away from Miss *Martin* for the purpose of being brought up a Roman Catholic. What we have to look to is the benefit of the child. As to the antenuptial contract that the children of the marriage should be brought up Roman Catholics, it has been decided over and over again that it is not in any legal sense binding. In *Andrews* v. *Salt* (1), the Court, in dealing with a document of this nature, said: "The first question we shall consider is, what is the legal effect of an agreement made before marriage between a husband and wife of different religious persuasions that boys should be educated in the religion of the father, and girls in the religion of the mother? We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a Court of Law, and it cannot be enforced by a suit for specific performance in equity. We think that a

(1) Law Rep. 8 Ch. 622, 636.

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father cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children, and not for his own. We entirely agree with the decision of the Lord Chancellor of *Ireland* (*In re Meades* (1)), in which he held that the Court could not during the lifetime of a father compel him out of his own funds to educate a child in a different religion from his own. So, also, if after a father's death it appeared to the Court that it was most for the benefit of a child to be educated in the religion of his father, we think that the Court would not abstain from ordering him to be so educated because the father had agreed with the mother that the child should be educated in her religion. On the other hand, if, after the death of the father, circumstances happen which, in the opinion of the Court, make it for the benefit of a child to be educated in the religion of the mother, and the question arises whether the father had so acted that he ought to be held in this Court to have waived or abandoned his right to have his child educated in his own religion, the fact that the father before marriage promised the mother that girls, the issue of the marriage, should be educated in her religion, is a circumstance to which in our opinion weight, and perhaps great weight, ought to be attached. This appears to have been the opinion of Lord *Hatherley*, from what he said on the subject in *Hill* v. *Hill* (2), though in that case he did not think that the fact of the agreement having been made was satisfactorily proved. *Hill* v. *Hill* goes far to support Mr. *Costelloe's* contention that the religion in which the child is to be brought up is not the father's religion, but the religion in which the father desires the child to be brought up; but it also shews that in some cases the Court may disregard the positive directions of the father. In the present case there is no one who has any right to say that the child shall be brought up in a particular religion, and what ought we to do? The child in the father's lifetime was left in the care of the kindest person whom the parents knew, and is it for the child's benefit that she should now be removed from that care? I say no—and Mr. Justice *Chitty* says no—in his very careful judgment, with which I entirely concur.

(1) I. R. 5 Eq. 98. (2) 10 W. R. 400.

BOWEN, L.J.:—

I am of the same opinion. We are not asked to interfere with the will or the rights of a living parent; the question is, what is to be done in the case of an orphan who has no guardian? In determining what the Court ought to do we have to consider that a father is charged with the right and duty of providing for the religious education of his children, and he cannot fetter himself in its exercise or renounce the right. An antenuptial agreement on the subject is one which he may consider himself bound in honour to carry out, but it is not legally binding upon him; he must from time to time consider what is in his judgment most for the good of the children, and an antenuptial agreement to have them educated in a particular religion is not binding on him during his life. So also declarations of his intention as to the religious education of his children made at one time are declarations from which he is at liberty to depart. This view of his position during his life throws light upon what ought to be done after his death. An antenuptial agreement as to the religious education of the children, which was not binding on the father during his lifetime, cannot be binding on the Court after his death. The principles on which the Court acts are laid down in *Talbot* v. *Earl of Shrewsbury* (1), and *Hill* v. *Hill* (2). What the Court has to look to is the benefit of the child, and in so doing it will pay great respect to the expressed wishes of the father, and further, it will not treat the matter as one of barter, and direct the child to be brought up in the religion of one set of relations merely because they offer a better provision for the infant than those on the other side. All the circumstances must be considered from the point of view of the infant's true welfare. Here the father was a Protestant, and though he had given an undertaking that the children should be brought up Roman Catholics, we cannot forget that he was a Protestant, and therefore could not have any conscientious objection to the Protestant religion, though he may have thought it his duty to fulfil his engagement by bringing up his children as Roman Catholics. He made no final disposition as to the religious education of his child, though he might have provided for it

(1) 4 My. & Cr. 672. (2) 10 W. R. 400; 31 L. J. (Ch.) 505.

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by appointing guardians. He had the child baptized as a Roman Catholic, but what was his wish at his death? That during his married life he intended to bring up the child as a Roman Catholic, I believe, but I do not think that he ever contemplated the contingencies which have happened. He died in the house of Miss *Martin*, a cousin of his wife, and committed his wife and child to her. He knew that his wife had no property, and Miss *Martin* was the only person on whom he could rely. He laid no charge on her that the child should be brought up a Roman Catholic, and his conduct leads to the conclusion that he had not formed a final wish that the child should be so brought up. What we have to consider is the benefit of the child; the child lived for years with Miss *Martin*, to whom she has become much attached, and from whom she has been taken away by force, and we consider it to be most for the child's benefit that the child should be restored to her.

I may add, that though the Court would have overruled the decision below if satisfied that it was wrong, yet it cannot lightly set aside a decision come to with such careful consideration by Mr. Justice *Chitty*.

KAY, L.J.:—

This case is of so much importance that I will add a few words. This jurisdiction has been called a paternal jurisdiction, which means that the Court, unless bound by some positive rule, will do what a wise father would do under the circumstances. The case is very peculiar. The child is about eight years old, and has neither father, mother, nor guardian. She has lived for years with Miss *Martin*, who had befriended her parents in their necessity, and in whose house the father died. He being without resources, commended on his deathbed his wife and child to Miss *Martin*, who had already befriended them. He did not add to his request to Miss *Martin* any directions as to religious education. He knew her to be a Protestant, and knew that she would probably take charge of the child, as turned out to be the case. The wife contracted habits of intemperance, and it appears that she died in the *Liverpool* workhouse infirmary. The child at that time had been three years with Miss *Martin*. After the wife's

death, her brother, Mr. *Conolly*, wished the child to be taken away from Miss *Martin*, that she might be brought up a Roman Catholic; and for this and no other reason, seized the child, shipped her off without an attendant, and in the charge of the stewardess of the ship, to *New York*, whence she was forwarded to a relation in *San Francisco*. After this conduct on the part of Mr. *Conolly*, his nomination as a guardian is out of the question; and the question lies between Miss *Martin* and the relations who took care of the girl at *San Francisco*. The point is whether the Court ought to take the child from Miss *Martin* for the sole purpose of having her brought up a Roman Catholic. The only cogent reasons are that the father, who was a Protestant, and the mother, who was a Roman Catholic, before their marriage, not as I think by reason of any agreement between themselves, but in consequence of a rule of the Romish Church, signed a document by which they undertook that all the children of the marriage should be brought up as Roman Catholics, and this child was baptized as a Roman Catholic with the father's consent. The father died before the child was capable of receiving religious instruction. It is now sought to have the child brought up, not in the faith of the father, but in the faith in which he had agreed that the child should be brought up. But that agreement was not binding on him; and I cannot believe that if it were possible to consult him, he would wish the child to be taken from Miss *Martin*. I do not think that a wise father would come to that decision. The child is attached to Miss *Martin*, and Miss *Martin* to the child, and such a connection ought not to be severed without strong grounds. The circumstances have a close analogy to those in *Andrews* v. *Salt* (1). There the father was a Roman Catholic, the mother a Protestant, and there was an agreement that the boys should be brought up as Roman Catholics, the girls as Protestants. The father died leaving no property, but leaving a will by which he directed that his children should be brought up as Roman Catholics, and appointed Roman Catholic guardians. There were two children—a boy and a girl. From the time of the father's death the girl, who was then not a year old, lived with the mother's relations till she was nearly nine.

(1) Law Rep. 8 Ch. 622.

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The guardian then claimed to have her delivered to him to be brought up as a Roman Catholic. *Mellish*, L.J., says (1): "The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations. On this ground, in *Hawksworth* v. *Hawksworth* (2) we affirmed an order made by Vice-Chancellor *Wickens*, which ordered a girl of eight years old, notwithstanding that her mother was a Protestant, to be educated in the religion of her father, a Catholic. It is clear, however, that a father may, by his conduct, lose his right even in his own lifetime, and much more after his death: and after giving the case the best consideration in our power, we have come to the conclusion that *Thomas Andrews* and the present appellant have by their conduct lost the right of requiring the plaintiff to be removed from the custody of the *Fleetcrofts* for the purpose of being educated as a Roman Catholic." There a guardian had been duly appointed; but after the child had been brought up as a Protestant so long, the Court would not allow him to take her away. Here the child was placed with Miss *Martin* by the parents, and remained with her from 1886 to 1890, when she was taken by force out of Miss *Martin's* custody. The Court is not obliged to do what I am satisfied is not for the child's benefit—to take her away from a kind friend for the mere purpose of having her brought up in another branch of the Christian religion.

Solicitors: *Clinton & Co.; Sharpe, Parker & Co.*

(1) Law Rep. 8 Ch. 638. (2) Law Rep. 6 Ch. 539.

H. C. J.

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Company—Winding-up—Surplus Assets—Contributories, Rights of, inter se—Ordinary and Preference Shareholders—Reserve Funds—"Profits"—Undrawn Profits—Capitalization—Capital—Income—Valuation.

The articles of association of a canal company formed under the *Companies Acts* authorized the company by resolution to increase its capital, but, save as specified in any such resolution, all new capital was to be subject to the same provisions as the original capital; and the articles also provided that the directors might, in priority to any dividend, set aside out of "profits" any sum as a "reserve fund" for certain specified purposes, or "any other contingencies or purposes of the company," and might invest the same; that any interest derived from such investment should be dealt with as profits; and that, subject thereto, "the entire net profits of each year" should belong to the shareholders. Subsequently the company increased its capital by the issue of new shares carrying a preferential dividend. Year by year part of the profits of the company's business was carried to three reserved funds to meet (*a*) depreciation of steamers, (*b*) insurance, and (*c*) canal improvements; and the remaining profits, after providing for the preferential dividend, were distributed among the ordinary shareholders. These reserve funds were not represented by any separate or specific investments, but were merely book-keeping entries represented in the company's balance-sheets by property of various kinds.

The company's undertaking was eventually sold by special Act of Parliament at a price which left a surplus in excess of the liabilities of the company and the capital paid up on the ordinary and preference shares. The sale was completed during the currency of a financial year. On the completion of the sale the company passed resolutions for a voluntary winding-up. It had never been found necessary to resort to any of the reserve funds while the company was a going concern, and part of them had been in fact divided among the ordinary shareholders in the form of bonus; and at the date of the sale three funds representing these reserve funds were still standing in the company's books:—

Held (varying order of *North*, J.), that all three reserve funds represented undrawn "profits," uncapitalized, and to be therefore treated as income to which, subject to the preferential dividend for the broken financial year, the ordinary shareholders were exclusively entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders; also, that in taking the accounts for the broken year, the value of the plant and book debts should be taken at the actual ascertained values as stated in the stock-books, and not at the lower values at which the company had, according to their regular custom and from motives of prudence, estimated them in a previous annual balance-sheet on which a dividend had been declared; and that the

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difference between the two values represented undrawn profits to which, subject to preferential dividend, the ordinary shareholders were exclusively entitled.

The question as to when undrawn profits can be treated as capital, discussed.

Bouch v. *Sproule* (1) considered.

APPEAL from Mr. Justice *North* (2).

It is necessary to add the following facts to those stated in the former report.

The capital of the *Bridgewater Navigation Company, Limited,* as originally fixed by the memorandum of association of August, 1872, was £500,000, in 500 shares of £1000 each; but in September and October, 1872, special resolutions were passed by the company dividing the capital into 50,000 shares of £10 each (instead of 500 shares of £1000 each), and also increasing the capital to £800,000 more by the creation of 80,000 new shares of £10 each.

After the issue of the 30,000 £10 preference shares (mentioned in the former report) pursuant to the resolution of April, 1880, the holders thereof received their preferential dividend of 5 per cent. out of the profits, and the whole of the rest of the profits, less the sums carried to the reserve funds and sums written off the value of the plant and machinery, were divided exclusively among the holders of ordinary shares.

Out of the purchase-money of £1,710,000 paid over by the *Manchester Ship Canal Company* to the liquidators of the *Navigation Company* on the 4th of August, 1887, they, in September, 1887, repaid to the preference shareholders the amount of the capital paid up on their shares, namely, £10 per share, and also repaid to the ordinary shareholders the amount of the capital paid up on their shares, namely, £3 10*s.* per share. The preference shareholders had also received all their 5 per cent. dividends up to the 31st of December, 1886, and the ordinary shareholders all the declared dividends, including that for the year ending the 31st of December, 1886, which was at the rate of 8 per cent.

The questions which were dealt with by Mr. Justice *North* in

(1) 12 App. Cas. 385. (2) [1891] 1 Ch. 155.

his recent decision (1), and on the present appeal from that decision, were, in substance—(1.) Whether the three reserve funds, amounting in the whole to £43,500, and made up of "Depreciation of steamers, £30,000," "Insurance fund to cover risks on the *Mersey*, £10,000," and "Canal and river improvement fund, £3500," were to be treated as undrawn profits, and therefore divisible among the ordinary shareholders exclusively, or whether they were to be treated as assets divisible among both the ordinary and the preference shareholders, in accordance with the decision of the House of Lords in *Birch* v. *Cropper* (2): (2.) Whether, in taking the account of profits for the broken period between the 31st of December, 1886, and the 6th of August, 1887, when the sale was virtually completed, the outstanding debts due to the company, and the company's plant and machinery, were to be estimated at a figure below their real amounts and values, according to the practice which had been always adopted by the company in their balance-sheets while a going concern; or whether the debts were to be taken at their actual ascertained amounts, and the plant and machinery at their values as appearing in the stock-books, so as to increase the profits divisible among the ordinary shareholders: in other words, whether the difference between the two values was to be treated as "profits."

Mr. Justice *North* decided, as to the first point, that the ordinary shareholders were exclusively entitled to the £3500 standing to the credit of the "Canal and river improvement fund," as being a fund representing "profits"; but that the other two funds did not represent "profits," and were, therefore, divisible among both the ordinary and the preference shareholders. As to the second point, his Lordship held, that the ordinary shareholders were only entitled to the profits actually earned (less preferential dividend) between the 31st of December, 1886, and the 6th of August, 1887, and directed an inquiry to ascertain those profits.

The representative of the ordinary shareholders appealed from that decision so far as it related to the first two questions stated in the report of the case in the Court below; and the

(1) [1891] 1 Ch. 155. (2) 14 App. Cas. 525.

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representative of the preference shareholders appealed from so much of the decision as declared that the "Canal and river improvement fund, £3500," was divisible exclusively among the ordinary shareholders.

There was no appeal as to the third question raised by the ordinary shareholders in the Court below and stated in the former report (1).

The appeal was heard before *Lindley*, *Lopes*, and *Kay*, L.JJ., on the 27th and 28th of February, 1891.

With regard to the three reserve funds, it appeared from the evidence of Mr. *Collier*, the company's accountant, secretary, and manager, and from the directors' reports and accounts, that they did not exist in the form of moneys carried to separate accounts and separately invested; that they were nothing more than book-keeping entries unrepresented by any specific investments, though they were represented by property of the company, such as "Stores on hand," "Cash in bankers' hands," and other entries appearing in the several balance-sheets.

Each of the funds, as appearing in the company's yearly accounts, represented the aggregate of sums deducted from profits from year to year. As to the "Depreciation of steamers" fund, and the "Insurance fund to cover risks on the *Mersey*," it appeared that it had never been found necessary to resort to either of those funds for the purpose of making good any depreciation or losses, since the value of the whole of the navigation company's plant and machinery, and any losses to vessels, had been kept up and made good out of the revenue for the current year.

The directors' report presented to the annual meeting of the *Navigation Company*, held in February, 1886, recommended that £13,282 6*s.* 6*d.*, part of the above-mentioned reserve funds, which, in view of the sale of the undertaking to the *Ship Canal Company*, they stated was not required, should be distributed among the ordinary shareholders by way of bonus. This was approved of by the meeting, and the transaction was carried out by extinguishing two of the then existing reserve funds and diminishing a third.

Subsequently, sums were again carried out of profits to the

(1) [1891] 1 Ch. 170.

several reserve accounts for the year ending the 31st of December, 1886, the dividend of the ordinary shareholders, declared in February, 1887, for the year ending the 31st of December, 1886, being thereby proportionately diminished.

Sir *Horace Davey*, Q.C., *Cozens-Hardy*, Q.C., and *O. L. Clare*, for the representative of the ordinary shareholders:—

First, as to the reserve funds. We submit that the learned Judge below ought to have held that the "Depreciation of steamers" fund and the "Insurance fund," as well as the "Canal and river improvement" fund, were divisible among the ordinary shareholders, the sources of all three funds being the same, namely, "profits." All the funds had been set apart, in the exercise of prudent management, in accordance with the practice of the company, out of ordinary profits, which would otherwise have been divisible among the ordinary shareholders *de anno in annum*; and, having been so set apart for purposes which are no longer required, they do not constitute capital divisible as such among all the shareholders in the winding-up, and the ordinary shareholders are entitled to have them brought back as profits, and distributed as such. They, in fact, constitute undrawn profits. Merely carrying profits to a suspense account does not capitalize them; there must be a clear intention to treat them as capital: *Bouch* v. *Sproule* (1). It is clear that the reserve funds were regarded as profits, for portions of them were returned to the ordinary shareholders as bonus.

Then, with regard to the second point, as to the mode in which the accounts for the broken period between December, 1886, and of August, 1887, should be taken, we submit that the difference between the estimated and the actually ascertained values of the company's debts, plant, and machinery, constitutes profits which belong to the ordinary shareholders. The only object of under-estimating the stock was to provide for depreciation in the event of its having to be sold while the company was a going concern. The difference between the estimated value as appearing in the balance-sheet, and the actual value as appearing in the stock-books, formed a depreciation fund to provide

(1) 12 App. Cas. 385.

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against the actual value not being realized; but the actual value has been realized, and therefore, the depreciation fund having ceased to have any purpose or meaning, it ought to go back to profits, out of which it was taken only by way of suspense to meet a contingency that has not occurred.

Buckley, Q.C., and *Swinfen Eady*, for the representative of the preference shareholders:—

By the articles of association the directors of the *Navigation Company* were authorized to set aside sums for capital purposes; and then it was provided that dividends should only be paid out of "profits." It seems plain that the sums so set aside were to be treated as capitalized, and no longer to be considered as "profits" and therefore divisible as dividend, because there is a direction at the end of art. 84 that the "interest" of the investment of any such sum "shall be dealt with as profits." In short, when once any such sum has been set aside, it is not part of the "profits," but is retained as part of the capital of the company, or of what the House of Lords called, in *Birch* v. *Cropper* (1), "the property of the company," and ceases to be divisible as profits. Then what are the rights of the preference shareholders in this part of the "capital" or "property" of the company? We agree that, under the resolutions creating the preference shares, those shares are entitled, as regards dividend, to nothing more than 5 per cent., payable in priority to all dividends on the ordinary shares; but those resolutions dealt with priority of dividend only, and not with priority of capital; and by art. 3, under which those resolutions were passed, it is provided that, "save as specified in any such resolution, all new capital shall be subject to the same provisions in all respects as if it had been part of the original capital mentioned in the memorandum of association." Thus the holders of preference capital and the holders of ordinary capital are put precisely upon the same footing, except that the preference shareholders are to have a priority as regards dividend; and, with respect to these reserve funds, the preference shares have the same right as the ordinary shares. It is common ground that the reserve funds did not

(1) 14 App. Cas. 525.

exist in the form of separate investments. They were, in fact, balances represented in some form or other—such, possibly, as steamers, or locks, or weirs—in the undertaking itself: they were part of the property for which the ship company gave the £1,710,000, and by which that amount of purchase-money was measured. So that the question, whether these reserve funds are "property" or "profits," has been already in substance decided by the House of Lords in *Birch* v. *Cropper* (1).

[KAY, L.J.:—Could the company, by making an investment, increase their capital under these articles of association?]

They could increase their "property." In setting aside a sum out of profits, under art. 84, they would not be increasing their "capital," but under that article they could retain it as a sum not available for dividend. These reserve funds are profits still, in the sense that, if they are taken out of profits and there has been no substantial loss, they must remain as profits; but they are not profits in the sense that the ordinary shareholders alone have a right to a distributive share of them. They are something which is retained, and in respect of which the preference shareholders, as much as the ordinary, have a right to receive their proportionate part now that the company is being wound up. They are an accretion to the assets of the company—that is to say, they form part of the "property" of the company, as distinguished from "capital," to which every member of the company is entitled to a proportionate part, according to the principle of the decision of the House of Lords in *Birch* v. *Cropper*.

As to the second point—the mode of estimating the value of the plant, &c.—it is said, on behalf of the ordinary shareholders, that, on the sale of the undertaking in August, 1887, the plant, &c., realized, in effect, a larger sum than the estimated value stated in the balance-sheet for 1886, and that the difference must be treated as profit. That is, we submit, a fallacy. The larger sum was not, in fact, realized at all. The ship company paid the £1,710,000 for the whole undertaking, and how much of that represented the plant, &c., it is impossible to say. It was under a deliberate and settled policy that the company

(1) 14 App. Cas. 525.

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kept a margin between the figures in the stock-books and those in the balance-sheets, and the matter ought not now to be reopened. The plant, &c., though kept up out of revenue, formed an accretion to capital, and was part of the undertaking bought by the ship company. The object of the expenditure out of revenue was to improve the whole undertaking, and, presumably, to increase the general value of the undertaking. If so, the increased price of the undertaking is divisible among both classes of shareholders as a sort of accretion to capital, and not as profit of the undertaking, according to the decision of the House of Lords. If plant which has been increased in value out of revenue is, in the winding-up, to be treated as profit, then, if in any other part of the undertaking, such as the canal or works, there is an increase in value out of the revenue, why is not that to be treated in a similar manner? Then, as to the outstanding book debts, the practice having been to value them year by year for the purpose of arriving at the balance-sheet, that practice should not be departed from in respect of the broken period of 1887.

Napier Higgins, Q.C., and *S. A. Sampson*, for the liquidators.

Sir *Horace Davey*, in reply.

1891. March 9. LINDLEY, L.J.:—

The question raised by this appeal is, how a portion of the surplus assets of this company, remaining after payment of all its debts and liabilities and paid-up capital, ought to be divided between the ordinary and the preference shareholders.

The company was formed in 1872, with a nominal capital of £500,000, divided into 500 shares of £1000 each, which were afterwards altered into 50,000 shares of £10 each, and this capital was at the same time increased by the creation of 80,000 new shares of £10 each.

In 1874 a special resolution was passed, authorizing the creation of preference shares; and in 1880, 30,000 preference shares of £10 each were issued. The preference consisted of a preferential dividend of 5 per cent.

In 1885 the *Manchester Ship Canal Company* was authorized to buy the undertakings and working plant of the *Bridgewater Navigation Company* for £1,710,000. In 1887 the *Bridgewater Navigation Company* was wound up voluntarily, with a view to the distribution of the above purchase-money and the ultimate dissolution of the company. Up to December, 1886, the accounts of the *Navigation Company* were regularly made up on the footing that the company was a going concern. On the 4th of August, 1887, the Company stopped business. The purchase made by the *Manchester Ship Canal Company* has been carried out; the purchase-money has been paid; the debts and liabilities of the *Bridgewater Navigation Company* have been discharged, and the shareholders, both ordinary and preference, have been repaid their respective paid-up capitals; but there is still a surplus for division.

The House of Lords has already decided in *Birch* v. *Cropper* (1) that the whole of this surplus does not belong to the ordinary shareholders as profit, and that, "after adjusting the rights of the shareholders *inter se* (other than their rights in respect of the purchase-money)," the surplus in question ought to be divided between both classes of shareholders in proportion to their shares. There still, however, remain for determination two questions—namely, first, whether certain reserve funds are to be treated as undrawn profits and ought to be divided among the ordinary shareholders exclusively, or whether these reserve funds are to be treated as assets divisible amongst both classes of shareholders; and secondly, whether, in ascertaining the profits for the period between the 31st of December, 1886, and the 4th of August, 1887, the outstanding debts due to and from the company and the company's plant and machinery are to be estimated below their real amounts and values, as they always were when the company was a going concern, or whether these debts, &c., are to be taken at their actual ascertained amounts and values.

The first matter for determination is whether the decision of the House of Lords has or has not settled those questions. Certainly they were not pointedly before the House; the controversy

(1) 14 App. Cas. 549.

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in the litigation set at rest by the House of Lords related to a totally different matter; and although there is some little ambiguity in the wording of the formal order of the House, I agree with Mr. Justice *North* that the questions which have now arisen have not yet been decided. The reserve funds are three in number, namely, £3500 standing to the credit of the canal and river improvement fund, £10,000 standing to the credit of the insurance fund, and £30,000 standing to the credit of the depreciation of steamers fund. None of these sums are actually set apart from the other assets of the company; they do not exist in the form of moneys carried to separate accounts and separately invested; the property representing them consists of the company's corporeal assets, and is mixed up with and not to be distinguished from other property of the same kind. On the other hand, it has been established beyond doubt that all these sums have been deducted from profits which the ordinary shareholders might have divided amongst themselves, but which it was considered judicious not to divide so long as the company was carrying on business. The sums in question are simply the undrawn profits of the ordinary shareholders.

With regard to the canal and river improvement fund and the insurance fund, there is really no controversy respecting either their origin or the purposes for which they were created, or their non-requirement for those purposes.

With respect to the insurance fund, the truth is that the company did not insure at all. They set apart some of the divisible profits in order to meet contingencies which are generally provided for by effecting insurances; but that is all. The sums set apart for this purpose were and remained undrawn profits, and nothing else.

With respect to the depreciation fund, Mr. *Collier's* deposition, and the directors' reports and accounts, establish that this fund originally consisted of undrawn profits, and that the value of the plant and machinery has been kept up out of revenue, and that this fund is not in fact required to make good any depreciation. The burden of shewing this to be the case is, I think, on the ordinary shareholders; but, considering the evidence to which I have alluded, considering that Mr. *Collier's* evidence on this head

is corroborated by several statements and entries shewing that revenue was expended for purposes for which the depreciation fund might have been applied; considering that his evidence on this point has not been challenged by cross-examination, and has not been met by any evidence to the contrary, I am of opinion that the truth of what I have above stated has been established.

It remains, however, to be considered whether these undrawn profits have been capitalized or so dealt with that they have become the property of both classes of shareholders instead of the property of the ordinary shareholders only. Carrying undrawn profits to a suspense account or to a reserve account does not necessarily change their character, still less their ownership; they remain the undrawn profits of those persons to whom they belonged, dedicated, no doubt, to certain purposes and applicable to those purposes, but not otherwise altered in their character or ownership. If the purposes for which such profits are set apart fail, or if the profits are not required for such purposes, they become divisible, not as capital, but as undrawn profits. When capital and profits belong to the same persons and in the same proportions, it becomes unimportant to distinguish the one from the other, and capitalization for convenience may be inferred from slight evidence. But when capital and profits belong to different persons, or to the same persons in different proportions, the effect of capitalizing profits is to change their ownership, and an intention to do this must be shewn before conversion of profits into capital can be properly inferred. Moreover, this is a matter on which a majority cannot bind a minority unless expressly empowered to do so by the constitution of the company, either as originally framed or as subsequently modified by some authority binding on all. As a matter of law, there can, I think, be no doubt on this point after the decision of the House of Lords in *Bouch* v. *Sproule* (1). Lord *Bramwell* says (2): "The truth is, as said by the Court of Appeal, that a trader, whether sole or corporate, trades with all the money he has got, let him have got it how he may. A sole trader with a capital of £10,000, who makes in a year a profit of £2000 and spends £1000 only, leaving the other £1000 in his business, may well in the next year be

(1) 12 App. Cas. 385. (2) 12 App. Cas. 405.

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said to have a capital of £11,000; not so where there is a partnership, whether an ordinary partnership or an incorporated partnership. There the undivided profits of any period, a year, or shorter or longer time, continue to be undivided profits unless something in the articles of partnership or some agreement by all the partners makes them capital. They do not become capital by effluxion of time or by their being used in the trading." And, as a matter of fact, this company has acted on this view; for in 1885 it divided amongst the ordinary shareholders £13,282, which had been previously standing to the credit of the reserve funds, and part of this sum was taken from the depreciation fund. The moneys standing to the credit of the three reserve funds in question were not profits earned between December, 1886, and August, 1887; they were profits earned in previous years; but on the winding-up of the company the question to be determined is to whom such profits belong, not when were they earned. I cannot agree with Mr. Justice *North* that there is any distinction between the three funds in question. He has given the canal and river improvement fund to the ordinary shareholders, but not the other two reserve funds. He appears to have considered that they were not profits, but sums which had to be taken into account before the profits could be ascertained. This, however, is a mistake. The company was under no obligation to insure or to create an insurance reserve fund; and if it did not choose to insure, and suffered no losses, the divisible profits would be increased.

As regards the depreciation fund, if the company chose, as in fact it did, to keep up the value of its plant, &c., and also to set apart some of its profits to meet unforeseen contingencies, such setting apart was not a necessary proceeding in order to ascertain the divisible profits; but they would have been larger by the amount carried over to the fund. The funds in question have not in fact ceased to be undrawn profits; they have not been capitalized or otherwise converted into assets to which the preference shareholders have any claim.

I pass now to the second question. Whilst the company was carrying on business, the debts owing by it were over-estimated, the debts owing to it were under-estimated, and the value of its

plant and machinery was also under-estimated. This was done from motives of prudence. The preference shareholders were not in any way prejudiced by it; they had their 5 per cent. The ordinary shareholders suffered by it, as, if the directors had been less cautious, the divisible profits would have been larger. But the necessity for this caution ceased when the company ceased to carry on business. There is no reason now for estimating anything; the actual value of everything is known; and the ordinary shareholders therefore contend that in taking the accounts from December, 1886, up to August, 1887, these items should be taken at their actual ascertained values, and not at estimated values as heretofore. Mr. Justice *North* has decided this point against them on the ground, as I understand it, that the difference between the estimated and actual values is not a profit of the period in question. But granting this to be so, nevertheless the profits of the whole trading, less 5 per cent. on the preference shares, belong to the ordinary shareholders, and unless the actual values of the assets and liabilities are taken, the result will be to give to the preference shareholders some portion of the profits which belong to the ordinary shareholders. The difference between the estimated and ascertained values really represents undrawn profits, and the only question is whether the ordinary shareholders have lost their right to them. It was strongly urged that the Court could not decide this point in favour of the ordinary shareholders without opening up the past accounts and disturbing the previous balance-sheets. But this is not really true. No past account will be reopened, no former balance-sheet will be disturbed. The problem now to be solved has never yet arisen for solution. The problem is no longer what is to be done in the way of dividing the profits of a going concern; the problem now is, how much of the whole assets of the company belongs to one class of shareholders, and how much to another; and if it appears that some of those assets consist of the undrawn profits of one of those classes, such undrawn profits ought to be distributed amongst the members of that class, unless some sufficient reason to the contrary can be shewn—and in this case there is no such reason.

I am therefore of opinion that the order appealed from must

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be varied by giving effect to the principles which I have endeavoured to explain. The costs of all parties ought to be treated as costs of the winding-up, and to come out of the funds to which both classes of shareholders are entitled.

Lord Justice *Lopes* has desired me to say that he concurs in the judgment which I have delivered.

KAY, L.J.:—

The *Bridgewater Company* were incorporated in 1872, and by their articles (83 to 86) it was provided that no dividend should be paid except out of the profits arising from the business of the company as shewn upon their balance-sheets; that the directors might set apart out of profits reserve funds for various purposes, and might invest the same, and the interest of such investments should be dealt with as profits; and that, subject to this and to any arrangement for remunerating officers by commission, the "entire net profits of each year" should belong to the shareholders and be divided among them.

The original capital of the company was 100,000 £10 shares, on each of which £3 10*s.* was paid. Subsequently they issued 30,000 additional £10 shares, which were paid in full, and the holders of these shares were entitled to a preference dividend of 5 per cent., but had no preference as to capital.

After payment of such preference dividend, all the remaining profits would be divisible among the ordinary shareholders.

On the 6th of August, 1887, the *Bridgewater Company* sold their undertaking to the *Manchester Ship Canal Company* under the powers of the *Manchester Ship Canal Act*, 1885, and on that day their business ceased. The sale was to take effect as upon the 4th of August, 1887. The price they obtained was much more than sufficient to repay all the paid-up capital. The preference shareholders have received their capital with a 5 per cent. dividend; the ordinary shareholders have received their capital and all the declared dividends, the last of which was at the rate of 8 per cent. upon an account made out to the 31st of December, 1886.

There still remains a large part of the purchase-money which has to be divided. The House of Lords decided in *Birch* v.

Cropper (1) that such part of this as is an accretion to capital ought to be divided among all the shareholders in proportion to the number of shares they held, and not in proportion to the amounts paid up on those shares.

There were still some questions to be determined as between capital and income, and these were brought before Mr. Justice *North* (2), and now come before us by way of appeal from his decision. The first I will deal with relates to three funds set apart out of revenue under the power to which I have referred, namely: (1.) Canal and river improvement fund; (2.) Insurance fund to cover risks on the *Mersey*, and (3.) Depreciation of steamers.

Each of these funds had been set apart some years ago, and the amounts increased out of revenue from year to year; but in February, 1886, the directors recommended that £13,282 6*s.* 6*d.*, part of these reserved funds, which in view of the sale of the undertaking to the *Ship Canal Company* they state was not required, should be distributed to the shareholders by way of bonus; and this was accordingly done by taking the whole of the first two mentioned reserve funds, and £3500 of the steamers depreciation fund. This transaction was authorized by a general meeting, and it proves conclusively that the shareholders did not consider that the act of reserving these funds had converted them from income into capital.

After this division, funds were again carried from revenue to each of these reserve accounts; and the dividend declared in 1887 upon the account made up to the 31st of December, 1886, was of course diminished by the amounts so reserved.

Mr. Justice *North* has held that the first reserve—the canal and river improvement fund—must be treated as income to which the ordinary shareholders are entitled; but as to the other two reserve funds he has come to a different conclusion. These he holds to be sums which have to be taken into account before you can say what the profits actually are. Taking the insurance fund as an illustration, the learned Judge says that, in the ordinary course, premiums would have been paid out of income to an insurance company; but this company chose to be their

(1) 14 App. Cas. 525. (2) [1891] 1 Ch. 155.

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own insurers. If a vessel were lost, so much of the property of the company would be gone; and to prevent such diminution the same sum (that is, I understand, the amount of the premiums), which would otherwise be payable, is taken out of the profits and put into the general funds of the company.

This, if I rightly follow it, is a decision that as premiums of insurance would ordinarily be payable, and the amount reserved represented such premiums, it was proper to deduct that amount in calculating the real profit. But this is in fact crediting the reserve fund to capital and treating it as such, which the company by their division of this very reserve in 1886 have demonstrated they did not intend. If there had been a loss, and to the extent of any such loss, the reserve fund might be treated as capital; but no loss in fact occurred. The capital was not diminished by any such accident; and the result is that this company did not in fact insure, but created an insurance fund which really was reserved out of income in order to recoup any such accidental loss by capital as would ordinarily be insured against. But this fund was not wanted for that purpose; and accordingly, not having lost its character as income, it seems to me that it should now be treated as those portions of the reserve fund which were not actually required were treated in 1886, and should be divided among the ordinary shareholders.

Precisely the same considerations apply to both the other reserve funds. If they were not wanted for the purposes for which they were set apart, they are still income divisible among the ordinary shareholders. I agree with Mr. Justice *North's* view that this is so as to the canal and river improvement fund.

With respect to the depreciation of steamers fund, there is a little more difficulty. If it could be shewn that there was an actual depreciation by wear and tear, accidental injury, or the like, and that the steamers had not been kept up to their original value out of current revenue, then this depreciation fund might be applicable to make up that deficiency; and, to the extent to which it was so applicable, it might be proper to treat it as part of the capital. But the evidence of Mr. *Collier*, who was accountant, secretary, and manager of the navigation company for many years, shews, I think, when fairly read, that the value of

the steamers was in fact kept up, and that this reserve was made, not on account of any depreciation in fact, but to provide for the possibility of loss in case of the sale of the undertaking as a going concern, or the plant being brought under the hammer. His evidence is confirmed by Mr. *Banner*, the accountant, who from an inspection of the books states that the balance-sheets and accounts submitted to the shareholders from time to time had been prepared and presented on the footing of the plant and works of the company being fully and efficiently maintained in good order and repair out of current revenue. This is corroborated by *Halliday*, another accountant; and, upon looking through the balance-sheets and reports, I find continual mention of repairs, and some purchases of steamers charged against revenue, which seem to justify these statements made in the evidence.

Against this there is no counter-evidence on this point whatever, nor was there any cross-examination upon this subject. The result is, that no depreciation has in fact occurred. The contingency which this fund was reserved to meet has not happened, and this fund must be treated as income divisible which, like all the others, has now been realized.

The remaining questions for decision relate to the mode in which the account of profits should be taken for the interval between the last balance-sheet and the 6th of August, 1887, when the sale was completed.

This was done in the former balance-sheets by first setting down all capital moneys received by shares, borrowings, or otherwise; and on the debtor side of this account were set down the various items of expenditure under the heads, (1.) "Cost of purchase of navigations, land, buildings, &c."; (2.) "New works"; (3.) "Plant, fixtures, &c." When the expenditure did not equal the receipts the undertaking was indebted to capital in the amount of the balance, and this had to be deducted before the amount available for dividend could be ascertained. But by reason of large repayments of borrowed money in later years, the balance was the other way. Capital had become indebted to revenue, and the amount to be credited to revenue on this account, according to the balance-sheet of the 31st of December, 1886, was £30,000. But this amount was arrived at not quite accurately. Although

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the other items of expenditure were literally set down, that for plant was made subject to a deduction of £2298 for assumed depreciation; so that, not its cost, but rather an estimate of its value, was debited to the capital account. This deduction of £2298 reduced by the same amount the balance to be credited to revenue.

By sect. 22, sub-sect. 2, of the *Manchester Ship Canal Act*, it was provided that the price thereby fixed was to include the working plant, as shewn and described in the stock account of 1884; and that if this exceeded or was less than its value an equivalent compensation should be made on the one side or the other. No valuation has been required. The plant, therefore, should be taken at the figure in the stock-book for 1884. If this was the same as or greater than the amount stated in the balance-sheet for 1886, without deducting the £2298, it may be said that, in effect, since that balance-sheet, the stock has been realized at the larger amount; and it is now claimed that the £2298 deducted from revenue by way of precaution should be recouped by inserting in the account to be taken up to the 6th of August, 1887, the amount at which the plant has been taken over; and I think that this claim is well founded.

There are two other items: one, the debts due from the company; the other, the debts due to the company. The amount of the former is actually less than appears in the last balance-sheet; the latter are greater in amount. These two differences, it is claimed, should be treated as accretions to revenue up to the 6th of August, 1887. Suppose a debt due from the company had been set down at £6000, but had been satisfied in the current year by a payment of £5000, the difference of £1000 would have been a benefit to revenue to that amount. So, if a debt due to the company had been estimated as worth only £5000, but £6000 had been recovered, the additional £1000 would also have increased the revenue of the period in which it was got in. In short, in making up this final balance-sheet it is no longer necessary or proper to put in estimates of the outstanding debts due to or from the company. The debts have been paid and realized respectively, and the actual amounts are known, and these amounts, whether less or greater than the last estimate, should

come into the final account just as they would have done if the payment had been made in any year of the current business.

Solicitors for the Liquidators: *Cunliffes & Davenport*, agents for *Lingards, Manchester.*

Solicitors for the Ordinary Shareholders: *Cunliffes & Davenport*, agents for *T. E. Sampson, Liverpool.*

Solicitors for the Preference Shareholders: *Burgess & Cosens*, agents for *Arthur Buckley, Manchester.*

G. I. F. C.

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Husband and Wife—Wife's Equity to a Settlement—Rights of Assignee of the Fund—Special Circumstances—Conduct of Wife—Acknowledgment by Wife before Commissioners—20 & 21 *Vict. c.* 57 [*Revised Ed. Statutes, vol. xiii., p.* 62].

Reversionary interests belonging to a married woman were assigned by her and her husband to a purchaser, and the married woman had the benefit of the purchase-money. The deed was acknowledged by her according to the provisions of the 20 & 21 Vict. c. 57, but was inoperative to bind her, as the reversionary interests were derived under wills made before the 31st of December, 1857. The reversionary interests fell into possession simultaneously during the life of both husband and wife. With respect to one of them, which was a sum of about £500, it was received by the husband and wife and expended in the maintenance of the family. The other fund was represented by a sum of about £500 in Court. The family were in necessitous circumstances, the husband being out of work and the family being mainly dependent on the earnings of the wife. The wife claimed her equity to a settlement as against the assignee of the fund:—

Held (reversing the decision of *Kekewich*, J., who settled the whole fund), that, although the assignment was nugatory, the Court would take into consideration the fact that she had joined in the assignment to the purchaser and had acknowledged the deed before the Commissioners, and also her subsequent conduct in assisting her husband to obtain the first sum of £500, as raising an equity against her. But, the assignee waiving his claim to half the fund in Court, the Court settled that on the wife and her children.

ADJOURNED SUMMONS.

Under the will, dated the 31st of May, 1849, of the Reverend

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John Lakeland, who died in the same year, his daughter *Harriet Lakeland* became entitled in remainder expectant on the decease of her mother (*Maria Lakeland*, afterwards *Maria Drew*) to one-sixth part of a sum of £3333 6*s.* 8*d.* Bank Annuities, which under the order made on the further consideration of this suit (being a suit for the administration of *John Lakeland's* estate), was carried over to a separate account, with a direction for payment of the interest to *Maria Drew* during her life, or until further order.

Under the will and codicils, dated respectively the 21st of January, 1856, the 25th of March, 1857, and the 22nd of January, 1857, of *John Roberts* (the grandfather of *Harriet Lakeland*), who died on the 20th of October, 1857, *Harriet Lakeland* was entitled to a share of that testator's residuary real and personal estate in remainder expectant on the decease of *Maria Drew.*

Harriet Lakeland, on the 23rd of October, 1858, was married to *Samuel Comber.* No settlement or agreement for a settlement was made on or after the marriage. In December, 1864, she and her husband caused both the reversionary interests to be put up for sale by public auction, and the same were sold to *Oliver Weston* for £170.

By an indenture dated the 17th of December, 1864, and made between *Samuel* and *Harriet Comber*, of the one part, and *Oliver Weston* of the other part, in consideration of £170 expressed to be paid to *Samuel Comber*, at the request of *Harriet Comber*, *Samuel* and *Harriet Comber* assigned the reversionary interests to *Weston.* This deed was duly acknowledged by Mrs. *Comber* in accordance with the provisions of the 20 & 21 Vict. c. 57.

By subsequent assignments the reversionary interests became vested in *Charles Lamb*, who died on the 25th of March, 1890, and *Leila E. G. Lamb* and *Thomas Thorp* were the executrix and executor of his will.

Maria Drew died on the 11th of July, 1889, and under an order made upon a petition presented in the suit subsequently to her death, the sum of £501, being one-sixth part of the net residue of the £3333 6*s.* 8*d.*, stock remaining after certain payments thereout had been made, was carried over to "The account of the executors or administrators of *Charles Lamb*, subject to the equity to a settlement of the Petitioner *Harriet Comber*, if any."

This summons was taken out by *Leila E. G. Lamb* and *Thomas Thorp*, asking in effect that the £501 might be paid to them as the legal personal representatives of *Charles Lamb*.

Harriet Comber claimed to have the whole of the £501 settled on herself and her children. From her affidavit it appeared that she was now fifty-four years of age and had four children, two of whom were infants and one a daughter, and none of them were earning anything, but all were dependent on her for support. Her husband had been in the employment of a tramcar company at a wage of 5*s.* 6*d.* per day, but for sixteen months past had been out of work. When in work he had contributed but little to the support of his wife and family, and was now unable to contribute anything, and the wife supported the family by keeping a small coffee-shop in which her daughter assisted, and by working as a dressmaker and charwoman. It also appeared from the evidence that upon the death of *Maria Drew* the amount to which Mrs. *Comber* became entitled under her grandfather's will was about £500, and that of this sum £100 was received by her husband, and the balance, with the exception of £5, had been exhausted in paying debts and in the maintenance of Mrs. *Comber*, her husband, and children. The receipt given to the trustee of the will on payment of the money was signed by both husband and wife.

It was not disputed that the purchase-money of £170 was paid, and there was evidence tending to shew that Mrs. *Comber* had the benefit of it.

The summons was heard before Mr. Justice *Kekewich* on the 24th of January, 1891.

Warmington, Q.C., and *Tucker*, in support of the summons:—

As the reversionary interests in question were derived under the wills of testators who died previously to the 31st of December, 1857, the date specified in *Malins' Act* (20 & 21 Vict. c. 57), it must be admitted that the assignment of the 17th of December, 1864, was ineffectual as regards the wife's interest in the funds if she survived her husband. But her equity to a settlement depends upon equitable considerations, and that equity was extinguished by the circumstances which took place subsequently

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to the death of *Maria Drew*. The husband and wife, by suppressing the assignment, then received one half of the property comprised in the deed of assignment, and the wife had the full benefit of the sum so received. In addition to this, she has received, or had the benefit of, the sum paid as consideration for the assignment. Under these circumstances, we submit that the Court ought not to direct any settlement to be made. But if any settlement is made, it ought to be limited to one half of the fund now in question. The Court will not direct a settlement of more than a half unless special circumstances are shewn, *e.g.*, that the husband is insolvent, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion: *In re Suggitt's Trusts* (1). In that case the Court declined to settle the whole of a fund of £575, under circumstances very similar to those of the present case. *In re Grove's Trusts* (2) is to the same effect.

S. Dickinson, for Mrs. *Comber*:—

The whole of this fund ought to be settled on Mrs. *Comber* and her children. The fact that a portion of the consideration money for the assignment was received by Mrs. *Comber* is immaterial. The assignment was simply the assignment of the husband, and must be wholly disregarded in dealing with the equity of the wife. Nor can her rights be prejudiced by what was done as to the fund derived under her grandfather's will. It belonged to her husband, so far as she was concerned, if she did not claim her equity. The whole of it went to him, either directly into his pocket, or in paying debts and liabilities—including the expense of the maintenance of his family, which he was bound to discharge. The fact that one half of the fund has been received by the husband is a strong ground for giving him no more: *Scott* v. *Spashett* (3); *Ward* v. *Yates* (4). The fund is small, and constitutes the whole fortune of the wife. The husband is not in a position to maintain his wife and children. No settlement was made on her by him on their marriage, and she and her children are in necessitous circumstances. All these are grounds for

(1) Law Rep. 3 Ch. 215.
(2) 3 Giff. 575.
(3) 3 Mac. & G. 599.
(4) 1 Dr. & Sm. 80.

settling the entire fund: *In re Cordwell's Estate* (1); *Scott* v. *Spashett* (2); *Gardner* v. *Marshall* (3); *Duncombe* v. *Greenacre* (4); *Koeber* v. *Sturgis* (5); *Taunton* v. *Morris* (6); *Ward* v. *Yates* (7). In *Scott* v. *Spashett*, the fact that the husband and wife were living together was referred to as a material consideration; but the pecuniary position of a wife who has to support her husband is worse than that of a wife living separate from him. The governing principle of all the cases is that the proper and due provision for the maintenance of the wife and children is the paramount consideration, and the husband and his assignees can only take subject to that provision being made.

Warmington, in reply:—

The jurisdiction invoked is a disturbance of the husband's legal right. The money belongs to the husband; but the wife's equity displaces his right to the extent to which the Court in its discretion thinks fit to direct a settlement. The conduct of the husband has always been considered a matter to be regarded. There must be aggravated misconduct in order to justify the Court in depriving him entirely of his right: see *Reid* v. *Reid* (8). Mrs. *Comber* has received a considerable sum of money, and it would be inequitable that she should now be permitted to claim as against the assignee of the husband the whole of the fund which was assigned by her full consent.

KEKEWICH, J.:—

I have to deal with a case in which a married woman has become entitled to a fund in Court which was reversionary, and has now fallen into possession. It is claimed by the assignee of her husband; and she, on the other hand, claims to have the whole of it settled on her and her children in the usual way. That is to say, I have to decide whether the husband's legal rights now vested in his assignee are or are not to be disturbed, and if they are to be disturbed, to what extent as regards amount.

(1) Law Rep. 20 Eq. 644.
(2) 3 Mac. & G. 599.
(3) 14 Sim. 575.
(4) 28 Beav. 472.
(5) 22 Beav. 588.
(6) 8 Ch. D. 453; 11 Ch. D. 779.
(7) 1 Dr. & Sm. 80.
(8) 33 Ch. D. 220.

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The first reason urged against the wife's contention is that she received £170 on the occasion of the assignment which she executed, which purports to have been acknowledged by her, and through which the Applicants derive title. There seems to be no doubt about it. She did. But what weight ought I to give to the circumstance? The law, which is for the protection of married women, has said that the deed, although executed by her—and I assume for this purpose executed by her as a free woman, without undue pressure on the part of her husband—and although acknowledged by her, is not her deed, and passes no interest, and if, accepting that, which is common ground, I were to hold that because she received part, or indeed the whole, of the consideration for the settlement, therefore she is to be deprived of rights which are hers, I should be giving to the deed an operative force which the law denies to it. As regards her, I must put the deed aside. As regards her husband, whatever right was in him vested in his assignee; and as the deed is binding on him, I need not refer to it.

The next objection is, that she received part of the property assigned by the deed. What I have already said about the £170 will apply to that so far as concerns the receipt by her of her own money. But it is urged that she and her husband acted dishonestly in the matter; that as they had executed this deed, which at any rate was binding on him, notice ought to have been given to those who, apart from her, were entitled to the fund, and that when they received this sum of about £500 under the will of the wife's grandfather, without giving notice to the present Applicants or their predecessors in title, there was a fraud on them, of which she took advantage directly to herself, or indirectly through her husband, and that that ousts her claim. I think the first answer to that is that the right was her husband's, and if he was guilty of dishonesty it is not material to inquire into that matter, because he was defeating the right of his assign, who was not the assign of the wife. She had not parted with her interest, whether as absolutely entitled to the fund on her surviving her mother the life annuitant, or as entitled to an equity to a settlement out of the fund when it fell into possession. She assigned nothing, and she did not claim to have a settlement out

of the fund. I am aware of no case in the books which shews that a married woman who fails to claim her equity to a settlement out of one fund is therefore disabled from claiming it out of another fund. Then it is said that she received this money. It may be assumed that she received some of it. But the only person who could give a receipt was her husband. The trustees might have required her concurrence; but her receipt alone would be of no use to them. It is not suggested that this was her separate property.

The sum of £100 was undoubtedly received by the husband; the balance was exhausted in paying debts—not the wife's debts, for she could not have any; they must therefore have been the husband's debts—and in the maintenance of herself, her husband and children; that is to say, in discharging duties which fell on the husband. Therefore it comes to this, that in one way or another the husband has had the larger part of this fund, amounting to one half of the property comprised in the deed of assignment, and one half of the entire property to which the wife could become entitled under any circumstances. For this reason it seems to me that this argument may be put out of the way.

Then it is argued on behalf of the wife that the whole of this fund must be settled, for the reason that she is without any means at all. Though she is living with her husband, he is not supporting her, and cannot support her. That circumstance, coupled with the fact of his having received a large part of her fund, is according to all the cases, and certainly according to *In re Suggitt's Trusts* (1) and the judgment of Lord *Cairns* in that case, and according to the other cases referred to by Mr. *Dickinson*, sufficient to justify a settlement of the whole being made. Reference was made to the former position of the husband, and it was said that some years ago he came into property of a fair amount having regard to his station in life. But what I have to consider is what is the position of the parties at the time when the wife claims her equity. She swears positively, and she is not contradicted, that her husband has had no work for sixteen months. When he had work he contributed, it seems

(1) Law Rep. 3 Ch. 215.

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very little, and sometimes nothing, to the support of the family, and of course now that he has no occupation he cannot contribute anything; and the wife is doing what she can to earn a little money to support herself and the children. That is the position I have to deal with; and it comes to this: Here is a small fund—that is an item for consideration—about one half of a larger fund, the other half having been taken by the husband. I have no evidence that there is anything else in the world to which this married woman is entitled. The husband is a man out of work, and who has not when in work contributed much to the support of the family. Under those circumstances, I think I should be disregarding the course of authority and the practice of the Court if I directed a settlement of anything less than the whole of this fund. The fund has been carried to a separate account with a view to this application, without which it could not have been dealt with, and therefore I think it fair that the costs of all parties should be paid out of the fund.

C. C. M. D.

C. A

From this decision the representatives of the assignee appealed. The appeal was heard on the 11th of March, 1891.

Warmington, Q.C., and *Tucker*, for the Appellants:—

The Court will not settle the whole of a wife's fund upon her and her children unless the husband is wholly unable to maintain his wife or has been guilty of gross misconduct towards her: *In re Suggitt's Trusts* (1). The question is not whether the husband does maintain his wife, but whether he can. Here the husband of his own accord gave up an employment by which he was earning 5*s.* 6*d.* a day; so he is able to maintain her if he chooses. The learned Judge treated the case rather as a question between the husband and wife than between the wife and the assignee. The wife's equity to a settlement is a creation of equity, and whoever claims it must come into Court with clean hands. Mrs. *Comber* was not, it is true, legally bound by the assignment, but she received the benefit of it, and her conduct both on the occasion of the assignment and when the first sum of £500 was

(1) Law Rep. 3 Ch. 215.

paid precludes her from now asserting her equity. There is no reported case similar to this; for although the acknowledgment of the deed was nugatory at law, yet Mrs. *Comber* stated in her separate examination before the Commissioners that she gave up all claim to any equitable right to the fund. Moreover, in obtaining the £500 from the trustees of *Roberts'* will, she joined with her husband in committing a gross fraud. The Court cannot shut its eyes to such conduct in dealing with a question which is entirely in its discretion: *Spirett* v. *Willows* (1). We assert that we are entitled to the whole fund; but under the circumstances of the case we shall be content if one half is made over to us, and the rest settled.

S. Dickinson, for Mrs. *Comber*:—

The assignment was simply void as regards the wife, and the acknowledgment and separate examination cannot be taken into consideration at all. With respect to the payment of the first sum of £500, there is no evidence that the wife ever received any portion of the fund. The assignment had been made many years before, and she had probably forgotten it. There is no evidence of fraud on her part; and the trustee, having had no notice of the assignment, was perfectly right in paying the money to the husband. Whether the wife joined in the receipt or not could make no difference; it was really the husband's receipt. Nothing has happened in the case to debar the wife from her equity: *Scott* v. *Spashett* (2); *Greedy* v. *Lavender* (3).

LINDLEY, L.J.:—

The question we have to decide on the present appeal is how much, if any, of a sum of £500, to which Mrs. *Comber*, a married woman, is entitled under the will of her father, ought to be settled on her under her equity to a settlement. It appears that in 1864, at the time of her execution of the deed of assignment, to which I shall presently refer, Mrs. *Comber* was entitled to a reversionary interest in two separate sums of £500 on the death of her mother—one under the will of her father, and the other

(1) Law Rep. 1 Ch. 520. (2) 3 Mac. & G. 599.
(3) 13 Beav. 62.

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under the will of her grandfather. In December, 1864, these two sums were put up for sale, and were sold to *Oliver Weston* for £170. On this occasion an ordinary deed of assignment was executed by Mrs. *Comber* and her husband, and both they and the purchaser being, I suppose, under the impression that *Malins' Act* (20 & 21 Vict. c. 57) applied, the purchaser took the precaution of having Mrs. *Comber* separately examined in accordance with the provisions of that Act; and she was so examined, and we are bound to assume that the purport of the assignment was duly explained to her, and that she assented to the sale and assignment of the two sums to *Weston* for £170. It turns out that, inasmuch as both the wills under which Mrs. *Comber* claimed were made before 1858, *Malins' Act* did not apply, so that so far as she was concerned the assignment was inoperative. But still the fact that Mrs. *Comber* was separately examined is important to this extent, that it affords conclusive evidence that she knew what was being done, and assented to it, and gave up her equity to a settlement so far as she could do so. I know of no case in which there has been any decision on the effect of such an examination and acknowledgment before the Commissioners; but there was an instructive case many years ago before Sir *W. Grant*, *Richards* v. *Chambers* (1), in which he went carefully into the question of the effect of taking the consent of a married woman in Court to an assignment by her husband of an interest that was reversionary, and the conclusion which he arrived at was that it would not enable her to dispose of an interest which she could not otherwise dispose of. I do not say that because she was separately examined she would be estopped by that fact alone from claiming her equity to a settlement; but we cannot disregard the fact that she was examined, and that she consented to release all her rights at that time. But beyond this we have this fact. By some slip no notice of the assignment was given to the trustee of the will of Mr. *Roberts*, the grandfather; and Mrs. *Comber* and her husband went to the trustee and got the whole of the fund under that will paid to them. The purchaser does not now object to one half of the remaining fund being settled on Mrs. *Comber*; but he claims the other half; otherwise he will be cheated out of the

(1) 10 Ves. 580.

whole of the funds which he purchased. Whatever we may decide, it is hard upon him; but it would be monstrous if we were to allow Mrs. *Comber* to have the whole of what is left. When she and her husband went to the trustee and got *Roberts'* fund, she knew that it had been assigned. Her affidavit is very unsatisfactory; but the effect of it is that a gross fraud was committed by the husband in getting the money. His assignment was perfectly good, and the fund belonged to the purchaser, and yet both husband and wife went to the trustee and induced him to pay it to them. Mrs. *Comber* joined, in fact, in the receipt. Mr. *Dickinson* contended that her signature to the receipt was perfectly nugatory. True, but she and her husband could not have got the money from the trustee without it; unless she had joined he would have refused to pay it, and if she had claimed her equity to a settlement he might have paid it into Court. To say that under these circumstances the Court ought to allow her to have the whole of what is left appears to me perfectly shocking. However, the purchaser consents that she shall have half the fund, and the utmost which the Court can give her is that half. With respect to the form of the settlement, I think that the Court ought to order an allowance to be paid to her out of the capital and income, instead of the income alone; as has been done in some former cases.

BOWEN, L.J.:—

This is a case in which we ought not to interfere with the discretion of the learned Judge unless we can see that some facts have been excluded or that some principle has been violated. In discussing a wife's equity to a settlement where the fund has been assigned, there are two things which must be distinguished. In the first place, we have to consider what are the relations of the husband and wife; and secondly, what is the wife's position with respect to the purchaser of the fund which is proposed to be settled. Has there been anything in the wife's conduct which would render it unconscionable for her to insist on her equity to a settlement as against the purchaser? I think that in this case the learned Judge has not sufficiently considered the purchaser's rights as against the wife. I will not go into the

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facts again, which have been already stated by Lord Justice *Lindley*, but without saying that the wife was guilty of a fraud, I will only express my opinion that she so far reaped the benefit of what was done by her husband as to make it unconscionable to settle the whole of the fund on her. For myself, I should not be inclined to extend the doctrine of a wife's equity to a settlement as against the assignee of the fund; but as the assignee here only claims half of the fund, I agree to the order which has been proposed.

KAY, L.J.:—

This case involves a question of considerable importance. A married woman comes here to assert the equity to a settlement to which she is *primâ facie* entitled; that is, she has certain rights in the property, not at law, but in equity; and it is well understood that when persons come into a Court of Equity to enforce rights which they have in equity, but not at law, they must come into Court with clean hands, and that there must be no good equitable reason against their asserting such rights.

The parties in the present case are in a humble condition of life. The husband is a tramcar driver and had been out of work for several months before the commencement of these proceedings. The wife had endeavoured to support herself and her husband and children by taking a small business, and they have been mainly dependent on her earnings. It would be a very strong case, as between her and her husband, for settling the whole of the fund, which is a small one, on the wife and her children; and if there had been nothing else in the case, I should have been inclined to follow the learned Judge in settling the whole fund. Probably he was influenced by his feeling for her condition when he made the order applied for. But I think he has not given sufficient consideration to the equity which arises between the married woman and the assignee. The fund has been assigned for value by a deed of the validity of which there is no question, and, as the reversions have fallen in during the coverture, beyond all doubt the legal right to the property passed to the purchaser. There were two separate funds, under two wills, in both cases reversionary on the death of

her mother, the tenant for life of the fund. Before they fell in, on the 2nd of December, 1864, the husband and wife joined in selling the reversionary interests for £170. The purchaser had previously advanced some money to them, and he paid the balance of the £170 to the husband. There was evidently a common mistake of all parties; they believed that *Malins' Act* applied, and that the wife could under that Act validly assign her reversionary interest in the funds and give up her equity to a settlement. They were wrong in that belief, because the wills were made before the commencement of the Act. But I find that all parties really believed that it was within the Act, and therefore the wife went through the ceremony of being separately examined before the Commissioners, which course, if that Act had applied, would have effectually released her equity to a settlement. They believed on both sides that she was giving up all her right in the fund, and that the purchaser was obtaining an absolute assignment. And no doubt the price given by the assignee was affected by this consideration. The acknowledgment by the wife must have been accompanied with a separate examination. The Act provides that the deeds shall be acknowledged and perfected in the manner prescribed by the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74) for the acknowledgment and perfecting of deeds disposing of interests of married women in Court. And when we look at the orders which were made under that statute, we find these directions for the guidance of the Commissioners—that they shall "inquire of any married woman separately and apart from her husband," among other things, "whether she intends to give up her interest in the estate to be passed by such deed without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest; and where such married woman, in answer to such inquiry, shall declare that she intends to give up such interest without any provision, and the said Commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive such acknowledgment." So that in the present case the wife must have deliberately stated that she did intend to give up her equity to a settlement out of this fund. That is an answer to

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the argument that her acknowledgment of the deed was futile. She did not in fact give up her right; but she believed that she was giving up, and she intended to give up, her right to a settlement.

Then we have another fact. After her mother died, she and her husband went to the trustee and got him to pay one of the sums of £500 to them. Not only did the wife know that the fund was paid, but part of it was paid into her own hand. She does not say in her affidavit that she had forgotten the assignment: therefore we have it clearly proved that, knowing of the assignment which she and her husband had made, the fund having fallen in, she deliberately went to the trustee and got him to pay it over to her husband and herself. If that does not raise an equity against her the law of this country ought to be modified. It is not only that she joined in the assignment of the fund, but also by her subsequent conduct she has raised an equity against herself. I agree that it would be monstrous to allow her to take away all the money that is left; but we are relieved from the difficulty of deciding whether any part of the fund should be settled. The assignee says he is willing to confine his claim to one half. If he had not done so there might have been a question whether we ought not to have given him the whole.

As to the form of the settlement, I think there have been instances in which part of the capital has been paid to the married woman. The children have no equity: that has been decided. Applying to the case our knowledge of persons in that class of life, I think that if we allow her every year some part of the capital, it will better enable her to bring up her children and place them out in the world. The appeal will therefore be allowed and, an order made in this form: That £20 a year be paid out of income and capital to the wife during her life for her separate use, and after her death the remainder be paid to her children at twenty-one, and if there should be none, then to the representatives of the assignee.

Solicitors: *Snell, Son, & Greenip,* agents for *Lamb & Gates, Brighton; Wilkinson & Son.*

M. W.

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Feb. 11, 12, 17.

In re HARRISON.
SMITH *v.* ALLEN.

[1889 H. 3504.]

Practice—Parties—Representative of Deceased Trustee or Executor—Orders of 26th August, 1841, *Order* XXXII. — *Consolidated General Orders*, 1860, *Order* VII., *r.* 2—*Rules of Supreme Court*, 1883, *Order* XVI., *rr.* 6, 11, 48.

In an action for a general account against a surviving executor and trustee it is not, in the absence of special circumstances, necessary for the Plaintiff to make the representative of a deceased trustee or executor a party. If the Defendant requires such representative to be added, and the circumstances of the case render it advisable that he should be so added, the Rules of the Supreme Court, 1883, provide by Order XVI., rules 11 and 48, the machinery for that purpose.

RICHARD HARRISON, by his will, dated the 28th of April, 1856, gave all his real and personal estate to trustees upon trust for sale and investment as therein mentioned, and to pay the income to his wife, *Alice Harrison*, during widowhood, and after her decease or second marriage in trust for all his children in equal shares as tenants in common, and appointed his wife, the Rev. *J. J. Cort*, *Samuel Renshaw*, and *Thomas Harrison* trustees and executors of his will; and by a codicil, dated the 26th of November, 1857, he appointed *James Ogden Allen*, the sole Defendant in this action, a trustee and executor in the place of the said *Thomas Harrison*.

The testator died in January, 1858, and his will and codicil were duly proved by the said *Alice Harrison*, *J. J. Cort*, *Samuel Renshaw*, and the Defendant.

The testator left four children surviving him, of whom the Plaintiff, *Mary Anne Allen Smith*, was one.

Samuel Renshaw died on the 15th of November, 1858, *Alice Harrison* died on the 9th of October, 1882, and *J. J. Cort* died on the 20th of October, 1884.

By an indenture, dated the 4th of August, 1874, and made between the Plaintiff, *Mary Anne Allen Smith* (then *Mary Anne Allen Harrison*, spinster) of the one part, the Plaintiff, *John O.*

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Smith, of the second part, and the Defendant of the third part (being the settlement made in contemplation of the marriage shortly afterwards solemnized between the said *John O. Smith* and *Mary Anne Allen*, his wife), the share and interest of the Plaintiff, *Mary Anne Allen Smith*, in the real and personal estate of the testator, were assigned to the Defendant upon trusts for the benefit of the Plaintiff, *Mary Anne Allen Smith*, and the child and children of the marriage as therein mentioned.

The Plaintiffs having made repeated applications to the Defendant to inform them of what the trust estate consisted, and to render them an account of the testator's estate, and the Defendant having neglected and refused to give any sufficient information or to render any proper accounts, and particularly with regard to a certain sum of £3350, the Plaintiffs commenced this action against the Defendant, as the sole surviving trustee of the testator's will, for administration of the real and personal estate of the testator, and to have it declared that the Defendant was guilty of a breach of trust in neglecting to see to the security and investment of the £3350, and that he was liable to make good all loss occasioned thereby, and also for the execution of the trusts of the settlement and for the removal of the Defendant as trustee thereof.

At the hearing the objection was taken that the action was defective for want of parties, as the representative of *J. J. Cort* ought to have been before the Court. It was admitted during the argument that it was unnecessary to have the representatives of the testator's widow and of *Samuel Renshaw* before the Court as they had been dead some years, and the relief asked was against *Allen* as defaulting trustee, who had commenced an action against the representative of *J. J. Cort*, claiming contribution as against him in respect of the trust funds, which action stood next in the paper for hearing.

Byrne, Q.C., *Yate Lee*, and *Wace*, for the Defendant:—

No judgment can be made in the present state of the record. The representative of *Cort*, the deceased trustee and executor, ought to be before the Court, and the action is defective for want of parties.

Before the 32nd General Order of the 26th of August, 1841, which order is repeated in the Consolidated Orders of 1860 (Order VII., rule 2), in an action of this kind where a general account is asked for, it was necessary to bring before the Court the representatives of deceased executors and trustees, and even after 1860 it was necessary: *Coppard* v. *Allen* (1).

[They also referred to *Perry* v. *Knott* (2); *Devaynes* v. *Robinson* (3); *Shipton* v. *Rawlins* (4); and *Wilson* v. *Rhodes* (5).]

Farwell, Q.C., and *Church*, for the Plaintiffs:—

The objection is wholly untenable. Under the present rules the objection is now curable. Order XVI., rule 11, provides that the Court or a Judge may at any stage of the proceedings, either upon or without the application of either party, order that the names of any parties, whether as plaintiffs or defendants, be added. The Plaintiffs might have applied, under that rule, to have *Cort's* representative added, or they might have proceeded under rule 48 of the same order, which relates to third party procedure. We submit that the objection wholly fails.

[They referred to *Perry* v. *Knott*; *Parker* v. *Lewis* (6); *Wilson* v. *Rhodes*; and *Boynton* v. *Richardson* (7).]

Byrne, in reply, referred to *Edison and Swan United Electric Light Company* v. *Holland* (8).

CHITTY, J.:—

At the Bar an objection was raised by counsel for the Defendant that the suit was defective for want of parties, and the objection was pressed so far as to amount to this, that no judgment could be made in the present state of the record in this action. Mr. *Harrison*, whose estate is sought to be administered, died in 1858, and he left four executors, who were also trustees of his real estate as well as his personalty. Three of the executors are dead, and the Defendant *Allen* is the sole surviving executor and trustee, and he is sued alone. It was admitted during the argument

(1) 2 D. J. & S. 173.
(2) 5 Beav. 293.
(3) 24 Beav. 86.
(4) 4 Hare, 619.
(5) 8 Ch. D. 777.
(6) Law Rep. 8 Ch. 1048.
(7) 31 Beav. 340.
(8) 41 Ch. D. 28.

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as to parties that the circumstances justified the Plaintiffs in omitting the representatives of two of the deceased executors and trustees, namely, the executrix and Mr. *Renshaw*; but it was contended that the representative of *Cort*, also an executor and trustee, ought to be made a party, and the argument was put in this way, that by the practice of the old Court of Chancery, before the General Orders of the 26th of August, 1841, the 32nd of which was in substance repeated in the Consolidated General Orders, 1860, Order VII., rule 2, it was necessary in an action of this kind, where a general account was asked for, to make the representatives of the deceased executors and trustees parties, and that even after the Consolidated General Orders, 1860, according to the decision of the Court of Appeal in *Coppard* v. *Allen* (1), where a general account was asked for, though the plaintiff had joint and several demands against the executors—those that were alive and those that were dead—it was necessary to make them all parties personally or by their legal personal representatives. It was pointed out that Order VII., rule 2, of the Consolidated General Orders, 1860, is not repeated in the Rules of 1883, and that is in fact correct, as by those rules the Consolidated Orders of 1860 are repealed. The rule which to some extent replaces Order VII., rule 2, of the Consolidated General Orders, 1860, is the 6th rule of Order XVI., which is to this effect, that the plaintiff may at his option join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes. So that this option conferred on the plaintiff is confined to the case where the liability is on a contract, and I need not say that a liability to account under a will is not a liability under a contract. But the matter does not rest there, because there are other important rules which appear to me to have altered the practice in this respect entirely.

It was necessary, or it was proper and convenient at any rate, to insert in the rules this 6th rule which I have just read, and that rule would be regarded on an application made under the 11th rule of the same order where the Court is asked to add a

(1) 2 D. J. & S. 173.

defendant, and there would be ground for saying that in a case falling within the 6th rule some very special circumstances ought to be shewn before the Court forces the plaintiff to add another person liable to his demand. But the 11th rule provides the machinery for getting over any difficulty of want of parties, and it is clear under that rule that the Court may on an application or without an application add a defendant, and consequently, if the Court had been applied to before this trial, the representative of *Cort* might have been added as a party had justice required it. I agree that the application may be made at any time; but in this case it is not made till the trial. There is another rule to which I will refer, because that completes the practice, I think, at the present day upon matters of this kind—that is, the 48th rule—in other words, the third party machinery. The real object of the Defendant's counsel in taking this objection, that *Cort's* representative is not here, was in order that he might get a contribution from *Cort* and bind him, and had the Defendant been so minded he might have made use of the third party machinery for the purpose of bringing *Cort's* representative before the Court. But there is this remarkable circumstance in the case: by not making any application till the trial, the Plaintiffs would, if I acceded to the argument, be placed in the position of making a person defendant against their will against whom they do not desire to proceed. That is not all: it would be a person who by reason of the lapse of time, and by reason of the Statute of 1888 (51 & 52 Vict. c. 59), could plead the *Statute of Limitations* in answer to the demand. It would be a denial of justice to put as defendant on the record a person who by reason of an intervening Act of Parliament would be able to present a complete defence. That point was not argued; but it was assumed by counsel that *Cort* would now be in a position to plead the statute. I am not called upon to express an opinion on it. That was agreed to be the result. I asked the Defendant's counsel whether he would undertake that risk if I insisted on the Plaintiffs making *Cort's* representative a party Defendant to the action against their (the Plaintiffs') will, and whether he would indemnify the Plaintiffs against the risk of having to pay costs. That offer has been declined. Under these circumstances I think the

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action is not defective for want of parties, and that at any rate the Defendant, who has brought his separate action, is not in a position now to insist on the representative of *Cort* being made a party.

Many judgments have been made without any opposition against a surviving executor and trustee, without joining the representatives of others who had died before the action was commenced, where there were no special circumstances in the case rendering it necessary that they should be parties. The order goes in the well-known form.

Solicitors: *Prior, Church, & Adams,* agents for *Richard Brice, Burnham; E. Flux & Leadbitter,* agents for *Turner & Sons, Preston.*

G. M.

CHITTY, J.
1891
April 11.

In re DICIDO PIER COMPANY.

Company—Reduction of Capital—Sinking Fund—Payment off of Preference Shares—Advertisements—Inquiries as to Creditors—Companies Act, 1877 (40 & 41 *Vict. c.* 26), *s.* 4 [*Revised Ed. Statutes, vol. xviii., p.* 368].

The capital of a company was divided into ordinary and preference shares, which, by the memorandum, were to "have the rights specified in the articles of association." The articles provided for a preferential dividend, and for setting aside out of the net profits, a sum equal to 20 per cent. of the amount of the preference shares for the formation of a sinking fund to pay off the preference shares at the end of five years; subject to this, the rest of the net profits belonged to the holders of ordinary shares. The company proposed to pay off and cancel all the preference shares pursuant to the articles, and presented a petition for reduction on this basis:—

Held, that the memorandum and articles of association created a valid contract, binding on both classes of shareholders, that a portion of the profits of the company should be set apart for the redemption and extinction of the preference shares; that the reduction, as proposed, did not involve a "payment to any shareholder of any paid-up capital" within the provisions of the *Companies Act,* 1877, s. 4, and that the order for reduction might be made without referring the petition to chambers for an inquiry and certificate as to creditors.

PETITION.

The *Dicido Pier Company, Limited,* was registered under the *Companies Acts* in 1884, with a nominal capital of £30,000, divided

into 460 ordinary and 140 preference shares, all of £50 each, which, according to the memorandum, were to "have the rights specified in the articles of association."

By clause 15 of the articles of association it was provided that the company might from time to time by special resolution reduce its capital.

By clause 142 the board were authorized "to reserve or set apart out of the moneys of the company such sums as in their judgment are necessary or expedient, to be at the discretion of the board applied in equalising dividends, or for providing against losses, or to meet claims or liabilities of the company, or to be used as a sinking fund to pay off the preference shares, or the debentures, mortgages, bonds, or incumbrances of the company, or for any other purpose of the company.

By clause 146 the net profits of the company were to be applied as follows:—

"1st. The holders of the preference shares shall be entitled to receive out of the profits of the company as a first charge a cumulative preferential dividend of 8 per cent. per annum on the amount for the time being paid upon the preference shares held by them respectively, and so long as such preference shares exist, or until a sufficient sum of money has been invested to pay off such shares in full, the company shall not borrow or raise any money under Article 12, except with the consent of three-fourths in amount of the preference shareholders.

"2nd. The profits of the company shall be applied in the next place in setting apart during five years after the commencement of business by the company, a sum equal to 20 per cent. of the amount of the preference shares issued by the company for the formation of a fund for paying off such shares at the expiration of five years.

"3rd. After payment of the interest on the preference shares, and setting apart 20 per cent. as provided in the last preceding clause, the surplus profits in each year shall belong to the holders of the ordinary shares."

All the preference shares were issued, and 160 of the ordinary shares, all fully paid-up.

The company commenced to do actual business in April, 1886,

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and had been most successful, dividends having been paid in the year 1890 on the ordinary shares at the rate of 90 per cent.

The preferred shareholders had received the 8 per cent. on their shares, and a sufficient sum had also been set apart out of the profits of the company for paying off the preference shareholders in full on the 17th of April, 1891, being the date of the expiration of five years from the commencement of business by the company.

By a special resolution passed on the 3rd of February and confirmed on the 3rd of March, 1891, it was resolved: "That the capital of the company be reduced from £30,000, divided into 460 ordinary and 140 preference shares all of £50 each, to £23,000, divided into 460 ordinary shares, and that such reduction be effected by returning to the holders of the 140 preference shares that have been issued, paid-up capital to the extent of £50 per share, out of the net profits of the company, set apart under clause 146 of the articles of association of the company, and by cancelling the capital represented by the said preference shares."

The company now presented a petition for the confirmation by the Court of this special resolution.

The petition stated, and it was also in evidence, that there were no debts owing by the company, except for current expenses, which were only of small amount, though there was a possible liability for repairs to the pier owing to a collision, in the event of the insurance being insufficient.

An order had been made in Chambers, in accordance with the directions in *In re Tambracherry Estates Company* (1), for the advertisement only of the presentation and hearing of the petition and dispensing with a certificate of creditors.

Ingpen, for the petition:—

The memorandum and articles of association contain a contract, binding on both classes of shareholders, that the preference shareholders are to get 8 per cent. for five years, then to get their whole capital back again and to submit to a cancellation of their shares. The reduction is made in pursuance of a contract, it

(1) 29 Ch. D. 683, 690.

does not involve the payment of any paid-up capital within the meaning of the *Companies Act*, 1877, s. 4, it is merely the division of a sinking fund formed from surplus profits. As soon as this fund has at the end of five years been paid to the preference shareholders they are to take no further share of the profits, and there is an implied obligation on their part, if not an express one, to consent to the cancellation of their shares. The company has practically no creditors, and such as there are if asked would readily consent. Further advertisement is not necessary.

No one appeared to oppose the petition.

CHITTY, J.:—

Whatever difficulty there may be in this case arises from the extraordinary prosperity of the company. [His Lordship after referring shortly to the facts continued:—] The memorandum of association expressly refers to the articles, and provides that the ordinary and preference shares are to have the rights specified therein, it therefore incorporates the provisions as to the various rights of both classes of shareholders, which are defined by the articles, the material ones being Articles 142 and 146. Article 142 provides for the creation of a sinking fund for the purpose, among others, of paying off the preference shares; Article 146, after providing for a cumulative preferential dividend of 8 per cent. on the preference shares goes on thus: [His Lordship read clause (2) and continued]. Subject to providing this dividend of 8 per cent., which has been done, and to setting aside this 20 per cent. for five years, the surplus profits are to belong to the ordinary shareholders. This then is the contract embodied in the memorandum under which, in my opinion, both classes of shareholders have enforceable rights; in other words, the preference shareholders could have claimed this fund had they so desired, and conversely, the ordinary shareholders could have insisted that this fund should be applied in payment off of these preference shares; hence there is a contract referred to in the memorandum under which at the expiration of five years from the commencement of business by the company, the preference shares are to be extinguished,

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not out of any capital moneys of the company, but by means of a fund representing accumulations of surplus profits. This is a contract which, in my opinion, it was competent for the shareholders to enter into. The company has passed a formal resolution to apply the fund in hand to the purpose for which it was established; this resolution, and the proceedings founded upon it, involve a cancellation of capital, but it is a cancellation according to a contract, and by means of money which is not capital money of the company—though it is money which any creditor of the company could have reached, had it been necessary, by means of an action at law or other proceeding—I think, therefore, that it is competent for the Court to sanction this reduction by allowing the cancellation of these preference shares in accordance with the contract. But there is still a question which remains to be decided, namely, whether this case does or does not fall within sect. 4 of the *Companies Act*, 1877, and before I sanction this reduction I must satisfy myself that the case does fall within the proviso in sect. 4, or I must send the petition back to Chambers for further inquiry and certificate as to creditors. I may mention that there appear to be some creditors, though not to any great amount: I cannot act on the suggestions made at the Bar as to the probability of all the creditors assenting, and as to the smallness of the amounts due to them, but I must determine judicially, whether the case is within sect. 4 or not. Sect. 4 provides, in effect, that creditors shall not be entitled to object, or required to consent, first, when the proposed reduction does not involve the diminution of any liability in respect of unpaid capital, or second, "the payment to any shareholder of any paid-up capital." It is clear that the reduction proposed in this case does not involve any diminution of liability in respect of unpaid capital. Does it involve the payment to any shareholder of paid-up capital? Both classes of shareholders are entitled to enforce a contract which, as I have said, is valid at law: this fund might have been paid direct to the preference shareholders, who then would have been bound under the contract to submit to a cancellation of their shares; and the consequent reduction is thus made in pursuance of a contract which is, that the profits of the company

to the extent mentioned, shall be applied towards the redemption or extinction of these shares, and which involves, if not expressly, certainly by necessary implication, the cancellation of these shares, with a consequent reduction of capital to this amount. The proposed reduction therefore does not, in my opinion, involve the payment to any shareholder of paid-up capital, and on this point Mr. *Ingpen's* argument was sound, because it is the right of both classes of shareholders that on this payment being made to the preference shareholders, out of the profits of the company, of the full value of their shares the rights of the preference shareholders as shareholders shall cease. The case is a very peculiar one and not likely to occur again. I make the order as asked.

Solicitors: *Pitman & Sons.*

W. C. D.

NORTH, J.
1891
April 29, 30

In re THORPE.
VIPONT *v.* RADCLIFFE.

[1878 T. 97.]

Administrative Action—Jurisdiction—Trustee—Personal Profit.

Under an order made on further consideration of an administration action, costs were paid to solicitors. The solicitors paid over half the profit costs to a defendant, a trustee of the estate being administered:—

Held, that there was no jurisdiction on summons in the action to order the Defendant trustee to pay into Court the amount so paid to him.

THIS was an action for the administration of the estate of *Charles Loftus Thorpe.*

The Defendants were his trustees and executors, *John Vipont Radcliffe* and *Walter Butler.* The conduct of the action had been given to *Charlotte A. R. Lee.*

Under an order made on further consideration of the action, certain costs had been taxed and paid to Messrs. *Saffery, Huntley, & Son,* who had acted as solicitors in the action for the Plaintiff and Defendants. The Defendant, *Walter Butler,* was a solicitor. In 1869 he sold his business to Messrs. *Saffery, Huntley, & Son.*

This was a summons by the person having the conduct of the action for an order on the Defendant *Butler* to pay into court a sum of £716 14*s.* 11*d.*, being half the profit costs of Messrs. *Saffery, Huntley, & Son,* earned in the action, which had been paid over to the Defendant *Butler* after they had been received by them.

Napier Higgins, Q.C., and *Borthwick,* for the Defendant *Butler*:—

There is no jurisdiction to make the order asked merely on summons in this action.

Cozens-Hardy, Q.C., and *Ribton,* for the summons:—

The Defendant *Butler* is bound to account for the profit he has received: *In re Corsellis* (1).

(1) 34 Ch. D. 675.

[NORTH, J.:—The costs have been properly paid; they were severed from the estate. The sum received by the trustee never was part of the testator's estate; the money could not be followed into an investment: *Lister & Co.* v. *Stubbs* (1).]

In *Sugden* v. *Crossland* (2) a similar order was made.

[NORTH, J.:—There the relief given was part of the subject-matter of the action.]

The money received by the trustee became a debt due to the estate from him; he, being an accounting party in the action, can be ordered in the action to pay it in.

William Baker, for the other Defendant.

NORTH, J.:—

I do not see my way to make any order on this summons. The facts I assume, for the purpose of considering the objection now raised, to be that costs were ordered to be paid to a firm of solicitors, and were duly paid to them, they being entitled to receive them, and being persons against whose right to receive the costs no suggestion could be made; but by reason of some agreement between these solicitors and one of the executors they handed over to him half the profit costs. Now a person beneficially interested in the estate asserts that the sum handed over was a sum received by the executor in a fiduciary character, which he cannot retain but must account for to the estate, which was part of the estate, not in the sense that it ever was part of the actual estate, but it was something which, owing to the conduct of the executor, he became liable to account for. I do not see my way to make him account in this action, assuming the facts to be as I have stated. If an action is brought by the other executor, or by some one beneficially interested in the estate, for an account of the profit received by the executor, I do not see what answer he would have to it; and it seems to me rather a useless thing to insist on having the matter tried in a separate proceeding. But the Defendant objects to having an order made on him on this summons,

(1) 45 Ch. D. 1. (2) 3 Sm. & Giff. 192.

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and he has a right to do so. The money was paid out to persons who had a right to receive, and did receive it properly, at a time when no person could have enforced any claim to it on the part of the estate. It was only by a subsequent act that the executor became a constructive trustee; and in my opinion he must be made to account for it in a separate action. The costs had been taken out of the estate and separated from it, and the money received by the executor was not a part of the estate which could be earmarked and followed. Under the circumstances, I shall direct the summons to stand over; and if proceedings are not taken against the Defendant *Butler*, it will be open to him to apply. If proceedings are taken, I shall deal with the summons when I know what the result of the proceedings is. I will give the Applicant leave to take proceedings, the costs not necessarily to come out of the estate.

Solicitors for Applicant: *Agate & Garnett.*
Solicitor for Defendant *Butler*: *Hilder.*
Solicitors for other Defendant: *Fraser & Christian.*

D. P.

STONE *v.* LICKORISH.

STIRLING, J.

1891

Jan. 15, 31.

[1888 S. 5062.]

Costs—Taxation—Redemption Action—Solicitor-Mortgagee.

A solicitor-mortgagee acting as solicitor for himself in a redemption action is entitled to costs out of pocket, but not to remuneration for personal trouble. The objection to the allowance to a defendant solicitor-mortgagee of profit costs need not be taken at the hearing, but may be taken before the Taxing Master after judgment in the usual form containing the common order for taxation of costs has been given in a mortgagor's redemption action.

Cradock v. *Piper* (1) followed.

Price v. *M'Beth* (2) not followed.

SUMMONS to vary Taxing Master's certificate.

John Godwin Smith charged two policies of assurance on his life in the *Eagle Assurance Company*, with the repayment to Messrs. *Lickorish & Bellord*, a firm of solicitors, of certain advances made by them to him, and also with the payment of any other sum in which he then was or in which he might at any time be liable to them or their firm. *J. G. Smith* became bankrupt, and *William Johnson*, the trustee under his bankruptcy, assigned the policies to the Plaintiff, who brought a mortgagor's redemption action against Messrs. *Lickorish & Bellord*. In this action Messrs. *Lickorish & Bellord* acted as solicitors for themselves. Judgment in the action was given in the usual form on the 21st of February, 1889, and thereby an account was ordered to be taken of what was due to the Defendants under their mortgage, and "for their costs of the action, such costs to be taxed by the Taxing Master."

The Defendants delivered their bill of costs of the action, and Master *Spofforth*, the Taxing Master, in taxing their bill, allowed the Defendants profit costs as well as out-of-pocket costs.

The Plaintiff then objected to the allowance of all the items in the bill except such as were for out-of-pocket expenses, on the

(1) 1 Mac. & G. 664.

(2) 33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579; 12 W. R. 818.

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ground that the Defendants were mortgagees, and had acted as their own solicitors throughout the action.

The Taxing Master disallowed the objections, and gave the following reasons for so doing: "I have considered and disallowed the above objections. I crave leave to refer your Lordship to the cases of *London Scottish Benefit Society* v. *Chorley* (1) and *National Provincial Bank of England* v. *Games* (2). I consider this case comes within the above decisions, being costs of litigation. I consider this case is also distinguishable from *Re Roberts* and *In re Wallis* (3), and I have so dealt with the bill by allowing the costs of litigation pure and simple to the mortgagees." This Plaintiff then took out the present summons, asking that his objections to the taxation of costs in the action might be allowed, and that it might be referred to the Taxing Master to vary his certificate accordingly.

Macnaghten, for the Plaintiff, in support of the summons.

Maidlow, for the Defendants:—

This question ought to have been raised at the hearing; and it is too late to take the objection after a decree has been made in the usual form ordering an account to be taken of what is due to the Defendants for principal and interest and for their costs of the action: *Price* v. *M'Beth* (4).

Macnaghten:—

In *Cradock* v. *Piper* (5), a similar objection was taken, and Lord *Cottenham*, L.C., after reference to the Masters, came to the conclusion that it was competent for the Taxing Masters under a general order to tax costs to take into consideration the position of the parties, and that it was the practice for them to do so. That case was not cited to the Court in *Price* v. *M'Beth*, nor was *York* v. *Brown* (6), where *Knight Bruce*, V.-C., in the case of a solicitor-trustee, said: "To say that the decree or order ought to declare that the party is entitled to no costs, except costs out of

(1) 12 Q. B. D. 452; 13 Q. B. D. 872.
(2) 31 Ch. D. 582.
(3) 25 Q. B. D. 176.
(4) 33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579.
(5) 1 Mac. & G. 664, 674.
(6) 1 Coll. 260.

pocket, is, I apprehend, quite new." *Price* v. *M'Beth* (1) is not consistent with the authorities, and is not followed: *Seton* on Decrees (2). The practice of the Taxing Masters is, I submit, entirely against it. I ask the Court to make inquiry of the Taxing Masters as to the practice prevailing in their office.

Maidlow:—

Whether the Plaintiff is in time or not, he is wrong upon the merits. It is true that in *Sclater* v. *Cottam* (3) it was held that a solicitor-mortgagee, who had acted as his own solicitor in a suit in defence of his title to the mortgage property, could only be allowed costs out of pocket as against a second mortgagee; but in *London Scottish Benefit Society* v. *Chorley* (4), it was decided that where an action is brought against a solicitor, who defends it in person and obtains judgment, he is entitled on taxation to the same costs as if he had employed another solicitor to act for him, except as to items which his acting directly has rendered unnecessary; and it was pointed out by Lord Justice *Fry* in that case that this rule works beneficially to the public, because the full costs to which the solicitor would be entitled if he employed another solicitor are under it subject to deductions of which his opponent gets the benefit. By that decision *Sclater* v. *Cottam* was inferentially overruled.

The question was also raised in *In re Donaldson* (5), and there it was held, that if a solicitor is one of a body of mortgagees, and acts as solicitor in enforcing the mortgage security, he is entitled to profit costs against the mortgagor whether the mortgagees are trustees or not. In that case, moreover, *Bacon*, V.-C., said that if under such circumstances as these a mortgagor desired to raise an objection to profit costs, he ought to state his objection in his petition for taxation; and the learned Judge characterized *Sclater* v. *Cottam* as a very special case, and one which could not be regarded as an authority upon the case before him. *Price* v. *M'Beth* is, I submit, an authority for the allowance of profit

(1) 33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579.
(2) Pages 486, 1061.
(3) 3 Jur. (N.S.) 630.
(4) 13 Q. B. D. 872.
(5) 27 Ch. D. 544.

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costs in such a case; and it is recognised in the books of Practice as a binding authority, and has been frequently acted upon.

[He also referred to *In re Wallis* (1).]

[STIRLING, J.:—If *Price* v. *M'Beth* (2) has been regularly acted upon, I shall not depart from it; but it seems to be inconsistent with *Cradock* v. *Piper* (3) and other cases. And my present impression is that I ought to make inquiry of the Taxing Masters as to their practice: see *Morgan* and *Wurtzburg* on Costs (4).]

Macnaghten:—

The *London Scottish Benefit Society* v. *Chorley* (5) was not a case of mortgagor and mortgagee, but of an ordinary litigation, and all that was decided was that when a solicitor acts for himself in an ordinary litigation he is entitled to charge the usual full costs, with a certain exception. In *In re Wallis*, *Sclater* v. *Cottam* (6) was approved, and it was held that a mortgagee-solicitor, acting as his own solicitor, cannot charge profit costs for his professional services to himself as against the mortgagor. Here the solicitors have not instructed other solicitors, but have chosen to appear personally, and they can have no costs except their out-of-pocket expenses.

Maidlow:—

There is a distinction between mortgagee's "general costs," as mortgagee, and his costs of litigation as defendant in an action for redemption. This was recognised in *Cradock* v. *Piper* (7), and also in *In re Corsellis* (8). In *Sclater* v. *Cottam*, there was no question as to the right of the solicitor to have his general costs of the action. There is no authority against my contention as regards the costs of the action.

STIRLING, J.:—

I propose to make inquiry of the Taxing Masters as to the

(1) 25 Q. B. D. 176.
(2) 33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579.
(3) 1 Mac. & G. 664.
(4) Pages 388, 390, and 500.
(5) 13 Q. B. D. 872.
(6) 3 Jur. (N.S.) 630.
(7) 1 Mac. & G. 664, 679.
(8) 34 Ch. D. 675, 681.

practice adopted by them in these cases, and I will postpone my judgment for that purpose.

Jan. 31. STIRLING, J. (after stating the facts, continued):—

When the matter was argued in Court, the first contention was that the objection raised was taken too late; that according to the decision of Vice-Chancellor *Stuart* in *Price* v. *M'Beth* (1). such an objection should have been taken at the hearing. Now, in the report of that case in the *Weekly Reporter* (2), and also in *Morgan* and *Wurtzburg's* Treatise on Costs, there are notes by the learned reporter and the learned authors respectively suggesting that the decision in *Price* v. *M'Beth* is inconsistent with that in *Cradock* v. *Piper* (3). It was laid down by Lord *Cottenham* in *Cradock* v. *Piper*, that where an order had been made in the usual form for the taxation of costs in a suit where a solicitor had acted for a body of trustees of whom he was one, it was open to the Taxing Master, upon objection being taken before him, to go into the question whether the trustee acting as solicitor ought to be allowed profit costs or not; and that rule was laid down on the ground that there was a long-continued practice of the office to that effect. The Vice-Chancellor in the case of *Price* v. *M'Beth* does not seem to have thought fit to make any inquiry as to what was the practice as to the taxation of these costs; and observing that the decision had been questioned in the way I have mentioned, I thought it right that I should make inquiry as to what the practice of the Taxing Masters with reference to this matter was. This I have done, and I have received from the senior Taxing Master a certificate "that the practice of the Taxing Masters with regard to the question of allowing profit costs to a solicitor-mortgagee in an action for redemption is to entertain and decide on an objection, and not to refuse to entertain it because it has not been taken at the hearing of the action." It appears, therefore, that the decision in *Price* v. *M'Beth* is not in accordance with the practice in the Taxing Office; and seeing that it is inconsistent with *Cradock* v. *Piper*, I think that I am bound to consider the validity

(1) 33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579.

(2) 12 W. R. 818.

(3) 1 Mac. & G. 664.

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of the objection, and not to set it aside because it was not taken at the hearing. The certificate goes on in these words: "I am desired to add that upon the question whether a solicitor-mortgagee is entitled to profit costs in such an action, the Taxing Masters differ in opinion." Upon that I thought it right to inquire more particularly to what extent they differ; and the result of my inquiry is this, that previously to the recent decision in *In re Wallis* (1), six of the seven Taxing Masters, and their immediate predecessors, so far as is known, always allowed profit costs, but that the seventh Taxing Master, who had held office since 1879, had uniformly disallowed them. Since the decision in *In re Wallis* there has been a further division of opinion, three of the six who had previously allowed those costs now disallowing them, while the remaining three adhere to their old practice. Under these circumstances, I think that it cannot be considered that there is any established practice in the Taxing Masters' Office in reference to the allowance or disallowance of those costs, and that the case must be decided on principle.

Now, upon the principle to be applied, I have the guidance of decisions which, though they do not govern the exact point before me, nevertheless approach very near to it. In the case of *In re Wallis*, Lord Justice *Fry* divides the costs to which a mortgagee may be entitled into three heads—first, all proper costs, charges, and expenses incurred by him in relation to the mortgage debt or the mortgage security; secondly, the costs of litigation properly undertaken by him in reference to the mortgage debt, or the security; and thirdly, his costs of the redemption action. As regards the costs of litigation properly undertaken by the mortgagee in reference to the security, the governing decision is that of Vice-Chancellor *Kindersley* in *Sclater* v. *Cottam* (2), where he held that a solicitor was only entitled to the costs out of pocket—the principle being, that he was entitled to what he had disbursed, but not to that which was remuneration for his own personal trouble.

After that decision came the case of the *London Scottish Benefit Society* v. *Chorley* (3). There an action for money had and re-

(1) 25 Q. B. D. 176. (2) 3 Jur. (N.S.) 630.
(3) 13 Q. B. D. 872.

ceived was brought against a firm of solicitors who were not mortgagees. It was defended by the solicitors themselves; the action was dismissed with costs, and then the question arose what costs were to be given to the solicitors. It was held by the Court of Appeal that they were entitled to profit costs, though not to the same profit costs as if they had appeared by different solicitors.

In that state of the authorities there came the case of *In re Wallis* (1), which related to charges and expenses incurred with reference to the mortgage debt. There the mortgagees, who were solicitors, asked for profit costs of proceedings in relation to the mortgage debt as charges and expenses properly incurred. It was held that they could only have costs out of pocket. The decision in *Sclater* v. *Cottam* (2) was approved of; and that in *London Scottish Benefit Society* v. *Chorley* (3) was held to be inapplicable, because it had nothing to do with the relations between mortgagor and mortgagee. I will read a portion of the judgment of each of the Judges by whom the case was decided. Lord *Esher* says (4): "I think it is consistent with every principle of justice that a man should not be entitled to charge for costs and expenses when he has not incurred any." Lord Justice *Fry* says (5): "So far as I am aware, no case is to be found in which a mortgagee has been allowed to charge against the mortgagor, as part of his costs charges and expenses properly incurred, remuneration for work done or labour undertaken by himself personally. On the contrary, the Court has often said, 'Though you may recover, as part of your costs charges and expenses, payments which you have made for work done in relation to the mortgage debt or the mortgage security, yet, if you choose to do the work yourself, you cannot charge for it.'" Lord Justice *Lopes* says (6): "What are the ordinary terms of redemption of a mortgage? Those terms are, the payment by the mortgagor of principal, interest, and costs—that is, 'costs' in the ordinary sense of the word, and not remuneration for services rendered by the mortgagee himself."

(1) 25 Q. B. D. 176.
(2) 3 Jur. (N.S.) 630.
(3) 13 Q. B. D. 872.
(4) 25 Q. B. D. 180.
(5) Ibid. 181.
(6) Ibid. 182.

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The rule, therefore, appears to be that the mortgagee solicitor is entitled to be recouped expenses which he has incurred, but not to receive remuneration for personal trouble.

Deciding the present case on principle, it seems to me that I must apply that rule, and hold that the solicitor-mortgagee is only entitled to out-of-pocket expenses which he has incurred, and not to remuneration for personal trouble. I think, therefore, that the objection to the decision of the Taxing Master must prevail, and that the bill of costs must be sent back to him for reconsideration.

I have only further to deal with the costs of this application. This is a mortgagor's action for redemption. By the contract the mortgagee is entitled to costs charges and expenses properly incurred, and it has been held by the Court of Appeal that a mortgagee does not necessarily lose his right to costs by bringing before the Court a question as to the amount which is due to him in respect of principal, interest, or costs, even although he be unsuccessful in his contention: see *In re Watts* (1). It seems to me, having regard to the difference of opinion which has prevailed in the Taxing Masters' Office, that this is eminently a case in which I ought to apply this principle, and I therefore make the costs of this application costs in the action.

Solicitors for Plaintiff: *Collyer-Bristow, Russell, & Hill,* agents for *Stone, Simpson, & Son, Tonbridge Wells.*

Solicitors for Defendants: *Lickorish & Bellord.*

(1) 22 Ch. D. 5.

W. W. K.

FISHBURN *v.* HOLLINGSHEAD.

STIRLING, J.

1891

Jan. 23, 24; *Feb.* 4; *March* 14.

[1890 F. 1937.]

International Copyright—Foreign Painting—English Copyright—Registration—Right to sue for Infringement—Copyright Act, 1842 (5 & 6 *Vict. c.* 45) [*Revised Ed. Statutes, vol. viii., p.* 1152]—*International Copyright Act,* 1844 (7 & 8 *Vict. c.* 12) [*Revised Ed. Statutes, vol. ix., p.* 224]—*Fine Arts Copyright Act,* 1862 (25 & 26 *Vict. c.* 68) [*Revised Ed. Statutes, vol. xiv., p.* 162]—*International Copyright Act,* 1886 (49 & 50 *Vict. c.* 33)—*Berne Convention—Order in Council, Nov.* 28, 1887.

In order to entitle the owner of the English copyright in a foreign painting to sue in this country in respect of an infringement of such copyright, it is not necessary for him to have registered his ownership under the *International Copyright Acts,* but he must have previously registered himself as proprietor of the copyright under sect. 4 of the *Copyright Act,* 1862.

MOTION.

The Plaintiffs Messrs. *Halder & Co.* were the proprietors of the copyright in *Germany* in a panorama or painting of *Jerusalem and the Crucifixion of Christ,* painted by a German artist, named *Bruno Piglhein,* of *Munich.* The Plaintiffs Messrs. *Fishburn Brothers* were, by assignment from Messrs. *Halder & Co.,* the owners of the copyright in the picture in the *United Kingdom.*

This was a motion by the Plaintiffs for an injunction to restrain the Defendants from infringing their copyright by exhibiting in *London* a panorama which they alleged to be a colourable imitation of their picture.

The principal questions for the determination of the Court upon the hearing of the motion were, first, whether the panorama exhibited by the Defendants was, in fact, an infringement of the Plaintiffs' copyright, and, secondly, whether the Plaintiffs were entitled to sue in respect of that infringement. The second question alone calls for a report.

The material facts of the case were as follows:—

In February, 1885, a commission was given by a German gentleman named *Hotop,* a member of the firm of *Halder & Co.,*

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to Herr *Bruno Piglhein*, to paint a panorama of *Jerusalem and the Crucifixion of Christ*. *Piglhein* agreed to paint the panorama, and engaged two other artists, named *Frosch* and *Krieger*, to assist him. The three went together to the Holy Land, and remained for some time in *Jerusalem* and the neighbourhood, where they made sketches and took photographs of the place. On their return to *Munich*, *Piglhein* painted eight pictures, which, in the opinion of the Court, were unquestionably the foundation of the panorama, the latter being painted by enlargement on a scale ten times the size of the pictures. That panorama had since been exhibited, first at *Munich* and afterwards in *Berlin*, where it now was. After the termination of their employment by *Piglhein*, *Frosch* and *Krieger* went to the *United States* and to *Holland*, neither of which countries are within the *Berne Convention*, and there became engaged in painting panoramas of *Jerusalem and the Crucifixion*. One of these panoramas, painted under the direction of *Frosch*, was brought to this country, and exhibited by the Defendants in *London*; and it was that exhibition which the Plaintiffs now sought to restrain.

On the 17th of April, 1888, *Halder & Co.* had registered themselves at *Stationers' Hall*, in the register kept under 5 & 6 Vict. c. 45, as proprietors of the copyright in *Piglhein's* panorama. The entry was as follows:—

"Title: A painting or work of art—Descriptive title, article of sculpture or other work of art—Painting: Panorama of *Jerusalem or the Crucifixion of Christ*—Name and place of abode of the maker: *Bruno Piglhein, Munich, Germany*—Name of the proprietor of the copyright: *Halder & Co.*—Time and place of first publication: 3rd May, 1886, in *Munich, Germany*."

On the 1st of February, 1890, *Halder & Co.* assigned to *Fishburn Brothers* all the copyright of and in the picture to which *Halder & Co.* were entitled in the *United Kingdom* or in any part of the British dominions.

On the same date the following entry of the assignment was made at *Stationers' Hall* in the register kept under 25 & 26 Vict. c. 68:—

"*Painting of Jerusalem and the Crucifixion of Christ*"—Date of assignment: 1st February, 1890—Names of parties to assign-

ment: *Halder & Co.* and *Fishburn Brothers*—Names and places of abode: *North Shields*—Name and place of author of work: *Bruno Piglhein, Munich.*"

Hastings, Q.C., and *Swinfen Eady*, for the Plaintiffs:—

First, we say that registration was not necessary in order to entitle the Plaintiffs to sue; and, secondly, that if it be necessary, the registration which has been effected sufficiently complies with the requirements of the Act of 1862, under which alone, if at all, registration is necessary.

Rigby, Q.C., and *Eve*, for the Defendants:—

The benefit of the *International Copyright Act* of 1886 can only be acquired by registration, at any rate under the *Copyright Act* of 1862.

If registration is not necessary in the case of a foreign copyright, then British subjects are in a much worse position than foreigners, who can come here as assignees of a copyright in another country, and sue in that capacity without taking any preliminary step by way of registration: *Graves' Case* (1). The registration which has been effected in this case is not sufficient.

Hastings, in reply.

Feb. 4. STIRLING, J. (after stating the facts, and coming to the conclusion upon the evidence that the Defendants' panorama was a colourable imitation of *Piglhein's* picture considered as a whole, and, consequently, that it constituted an infringement of the Plaintiffs' copyright, continued):—

Then the next point is, whether the Plaintiffs have a right to sue in respect of that infringement, and the first question on that head which I have to consider is, whether registration of the copyright is necessary in accordance with the provisions of the statute of 1862, which created in *England* a copyright in paintings, drawings, and photographs.

Now, I have weighed as carefully as I can the arguments that were addressed to me, and I have endeavoured to form the best

(1) Law Rep. 4 Q. B. 715.

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opinion I can on that question, and though, from the point of view which I take, it may not be necessary to decide it in the present case, yet, having formed an opinion upon it, and as the case may come before me again or may go further, I think it desirable that I should state the opinion at which I have arrived, reserving to myself full liberty to reconsider it at the trial of this action. First of all, I begin in the consideration of this matter with the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), which deals with copyright in books, and in musical and dramatic pieces. Sect. 3 of that Act confers copyright in books for a certain time. Sect. 11 provides "that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright, shall be kept at the hall of the *Stationers' Company*, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company. . . . . And such copies so certified and impressed shall be received in evidence in all Courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence." Then sect. 13 provides "that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the *Stationers' Company* of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book," in the prescribed form. Sect. 20 applies the provisions of the present Act to musical and dramatic compositions. Sect. 24 provides "that no proprietor of copyright in any book which shall be first published after the passing

of this Act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the *Stationers' Company*, of such book, pursuant to this Act: provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid."

The provisions of this Act, passed in 1842, are tolerably familiar to us, and it is well established that they draw a distinction between two things, the copyright or property which exists independently of registration (as is plain from the provisions of sect. 24), and the right to sue, in respect of which the statute requires that before commencing any action, suit, or proceeding, an entry is to be made in the book of registry, pursuant to the Act. It has been held in reference to that, that when the entry is made, the plaintiff in an action subsequently brought may complain of infringements which took place before registration.

Next, passing from that, we come to the Act of 1844 (7 Vict. c. 12), which is the *International Copyright Act*, and that deals not merely with the copyright in books and in musical and dramatic compositions, but also with the copyright in prints and engravings, and in sculptures and other works of art, and it may be observed that, whereas the provisions of the Act of 1842 with reference to registration are those with which I have just been dealing, so far as I have been able to discover there was at that time no provision at all with respect to any registration of copyright in engravings or in sculpture. The provisions for the protection of engravings were of a different kind, viz., by means of the name and date of publication being put upon the plate. Now sect. 2 of that Act provides "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that, as respects all or any particular class or classes of the following works, viz., books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified

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in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privilege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the *United Kingdom* may be then entitled to under the hereinbefore-recited Acts respectively, or under any Acts which may hereafter be passed in that behalf." Then sect. 3 provides "that, in case any such order shall apply to books, all and singular the enactments of the said *Copyright Amendment Act*, and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such books were first published in the *United Kingdom*, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the *British Museum*, and to and for the use of the other libraries mentioned in the said *Copyright Amendment Act*." Sect. 4 is a similar enactment with respect to prints or articles of sculpture, or any other works of art, and it provides that "all and singular the enactments of the said *Engraving Copyright Acts* and the said *Sculpture Copyright Acts*, or of any other Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country"—so that it points there to future Acts of Parliament—"shall, from and after the time so to be specified in that behalf in such order, and subject to such

limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as hereinafter is provided, in such and the same manner as if such articles and other works of art were first published in the *United Kingdom*, save and except such of the said enactments or such parts thereof as shall be excepted in such order." Sect. 5 is a similar enactment as to dramatic and musical pieces; and then sect. 6 is the clause which provides for the registration which is pointed to by the three sections which I have just read: "No author of any book, dramatic piece, or musical composition, or his executors, administrators, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture or other work of art, his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any Order in Council to be issued in pursuance thereof, unless, within a time or times to be in that behalf prescribed in each such order in council, such book . . . . shall have been so registered, and such copy thereof shall have been so delivered as hereinafter is mentioned; (that is to say), as regards such book, and also such dramatic piece or musical composition (in the event of the same having been printed), the title to the copy thereof, the name and place of abode of the author or composer thereof"—that, I may point out, differs from the requirements of sect. 13 of the *Copyright Act* of 1842, inasmuch as it prescribes the registration of the name and place of abode of the author and composer, instead of the name and place of abode of the publisher—"the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the Order in Council under which the benefits of this Act shall be claimed, shall be entered in the register book of the Company of Stationers in *London*," that is the register book, as I read it, which is prescribed to be kept by the Act of 5 & 6 Vict. c. 45, passed in 1842. Then there is a similar provision as regards dramatic pieces and musical compositions in manuscript, and also a provision as

STIRLING, J. regards prints and other things, neither of which I need read. "And as regards any such article of sculpture, or any such other works of art as aforesaid, a descriptive title thereof, the name and place of abode of the maker thereof, the name of the proprietor of the copyright therein"—the place of abode is there omitted. I call attention to that because it relates to a point which was commented upon with reference to one of the registrations in this case—"and the time and place of its first publication in the foreign country named in the Order in Council under which the benefit of this Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in *London*." That, again, points to the same book, viz., the register to be kept under the provisions of the *Copyright Act*, 1842.

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Now, stopping there for a moment, I may point out two features in the Act. First of all, it imposes an obligation to register which does not exist as regards books or prints, or works of art, composed or made or published by British subjects; and secondly, it provides that all and singular the enactments of the *Copyright Amendment Act* and of the other Acts in force with relation to copyright in this country are to be applied in such and the same manner as if publication had first taken place in the *United Kingdom*, save and except such of the enactments or such parts thereof as shall be excepted in the order; that is to say, as I read it, that, unless express provision is made by the Order in Council for excepting from its operation some of the enactments, foreigners who claim copyright under the Act are to be subject to the same obligations as are imposed by the statutes on British subjects.

That view, I think, was also taken in the case of *Cassell* v. *Stiff* (1) by Lord *Hatherley*, from whose judgment I will read a few words: "He"—that is to say, the author—"is to have the same protection which the author of any other book would obtain under an Order in Council. He would obtain in that manner protection subject to all the other provisions of the statute, otherwise authors of foreign works would be placed in a better position than authors in this country, which certainly was not

(1) 2 K. & J. 279, 285.

intended. There is a careful and jealous provision that no author of a foreign work shall be in a better position in this country than the authors of works here are. It was not intended to give them anything more. The 3rd section of the statute provides, that under an Order in Council a foreign author is to be subject to all the provisions of the general copyright Acts, unless it should be otherwise specified in the order."

Now, down to that date there was no right in *England* of copyright in respect of paintings; that was created by the statute of 1862, 25 & 26 Vict. c. 68. Sect. 1 enacts that "the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, or photograph, which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death." Then I may pass by the rest of sect. 1 and sect. 2. Sect. 3 provides that "all copyright under this Act shall be deemed personal or moveable estate, and shall be assignable at law, and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing." Then sect. 4: "There shall be kept at the hall of the *Stationers' Company* by the officer appointed by the said company for the purposes of the Act (5 & 6 Vict. c. 45), a book or books entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs'"—that, therefore, directs a new book to be kept, with a different title from the one which had been kept under 5 & 6 Vict. c. 45—"wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, of the name and place of abode of the person in

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whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph, of the said work, and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration." Sect. 5 provides that "the several enactments in the said Act (5 & 6 Vict. c. 45) with relation to keeping the register book thereby required and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the Courts and Judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this Act. . . ." recognising the distinction between the register created by the Act and that which was created by the Act 5 & 6 Vict. c. 45.

Now the construction of sect. 4 of that Act is not free from difficulty, but it has been settled by the Court of Appeal in the case of *Tuck & Sons* v. *Priester* (1), and the result is that the copyright as a property exists independently of registration, as in the case of the Act of 5 & 6 Vict. c. 45, but "the proprietor of a copyright" (I read the words of Lord *Esher* (2)) "has no right to sue at all for a breach of it until after registration, and, even when he has acquired the right to sue, he cannot recover in respect of anything done before registration." In that last particular this Act of 1862 differs from the *Copyright Act* of 1842.

Then sect. 12 of the same Act says this: "This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty intituled 'An Act to amend the law relating

(1) 19 Q. B. D. 629. (2) 19 Q. B. D. 636.

to International Copyright,' in the same manner as if such provisions were part of this Act." Therefore that introduces into the Act of 1862 in the same manner as if there repeated sect. 4 of the Act of 1844, and also sect. 6, which provides for registration, not in the register directed to be kept by the Act of 1862, but in the book kept by the *Stationers' Company* under the authority of the *Copyright Act*, 1842. It will also be observed that the particulars which are required to be entered in the register kept under the Act of 1842 by the terms of sect. 6 differ from those which are required to be entered in the register to be kept under the Act of 1862 by sect. 4 of that statute.

Then the next Act which I have to consider is the *International Copyright Act*, 1886, and sect. 1, after providing for the title of the Act, says: "The Acts specified in the first part of the first schedule to this Act are in this Act referred to and may be cited by the short titles in that schedule mentioned, and those Acts, together with the enactment specified in the second part of the said schedule, are in this Act collectively referred to as the *International Copyright Acts*. The Acts specified in the second schedule to this Act may be cited by the short titles in that schedule mentioned, and those Acts are in this Act referred to, and may be cited collectively as the *Copyright Acts*." So that a distinction is drawn between the *International Copyright Acts* and the *Copyright Acts*. Sect. 4 is that on which the main argument in the present case turns: "Where an order respecting any foreign country is made under the *International Copyright Acts*, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order." By the first schedule it appears that the *International Copyright Acts* consist of the Acts of 1844, 1852, 1875, and sect. 12, and sect. 12 only, of the Act of 1862. Therefore the meaning of sect. 4 appears to be, that any provisions with respect to the registry and delivery of copies which are introduced by the *International Copyright Acts* (that is by virtue in this case either of the 7 & 8 Vict. c. 12, or sect. 12 of the Act of 1862), are not to apply to works produced in a foreign country except so far as provided by the order; that is to say, unless there is found in the order

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something intimating that those provisions as to registration are to apply.

Now as to the obligation to register which is imposed, not by the *International Copyright Acts*, but by the other copyright Acts, it seems to me that sect. 4 of the Act of 1886 does not deal with that, but that you must refer back to sect. 4 of the Act of 1844, which provides, as I have already pointed out, that "all and singular the enactments of . . . any Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as hereafter provided, in such and the same manner as if such articles and other works of art were first published in the *United Kingdom*, save and except such of the said enactments or such parts thereof as shall be excepted in such order." Consequently, the provisions of the *International Copyright Act* with respect to the registry and delivery of copies of works do not apply unless you find some express provision in the order directing that they shall. On the other hand, the provisions of the *Copyright Acts* as distinguished from the *International Copyright Acts*, appear to me to apply unless you find something in the order excepting the works of art from the obligation imposed by those enactments. I may say that this view appears to me to be confirmed rather than qualified by the provision of sect. 8, which was relied on on behalf of the Plaintiffs. When that section is looked at it is found to relate not to the *International Copyright Acts*, but to the *Copyright Acts*. "The *Copyright Acts* shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the *United Kingdom*, provided that the enactments respecting the registry of the copyright in such work shall not apply if the law of such

possession provides for the registration of such copyright." The registration there spoken of is the registration not under the *International Copyright Acts*, but under the general *Copyright Acts*, and the proviso appears to confirm the view that I take of sect. 4. Then sect. 6 provides that "where an Order in Council is made under the *International Copyright Acts* with respect to any foreign country, the author and publisher of any literary or artistic work first produced before the date at which such order comes into operation shall be entitled to the same rights and remedies as if the said Acts and this Act and the said order had applied to the said foreign country at the date of the said production." Then there is a proviso which does not apply in this case, because the work has only been recently brought here. Then sect. 11 provides that the expression "author" shall include any person claiming through the author.

In pursuance of that Act, an Order in Council was made on the 28th of November, 1887, which provides that "the convention, as set out in the first schedule to this order, shall, as from the commencement of this order, have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same." Then: "This order shall extend to the foreign countries following: *Belgium, France, Germany, Hayti, Italy, Spain, Switzerland, Tunis.*"

Then clause 3 says: "The author of a literary or artistic work which on or after the commencement of this order is first produced in one of the foreign countries of the copyright union shall, subject as in this order and in the *International Copyright Acts*, 1845 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions the same right of copyright, including any right capable of being conferred by an Order in Council under sect. 2 or sect. 5 of the *International Copyright Act*, 1844, or under any other enactment, as if the work had been first produced in the *United Kingdom*, and shall have such right during the same period, provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein, than that which he enjoys in the country in which the work is first produced. The author of any literary or

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artistic work first produced before the commencement of this order shall have the rights and remedies to which he is entitled under sect. 6 of the *International Copyright Act*, 1886." Then clause 8 says: "This order shall be construed as if it formed part of the *International Copyright Act*, 1886"; that introduces the definition clause which I have already read. Then the convention which is referred to provides, in art. 2, that "authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives."

Now, I have to inquire whether there is anything in this order or in the convention which provides for the application of the provisions of the *International Copyright Acts* with respect to registration. It is admitted on both sides that there is not, and therefore there is no obligation to register under the *International Copyright Acts*.

But how stands the case as regards the registration under the general *Copyright Acts*?

As I have already said, unless there is something in the order which excepts the enactments with respect to registration contained in the general copyright Acts, it seems to me that they must apply, and I have found nothing in the convention or in the order which makes any such exception. On the contrary, the provisions of art. 2 seem to indicate that they are intended to apply because the rights conferred on a foreign author are those which the respective laws grant to natives, and the rights which by the laws of this country are granted to natives or British subjects are two—first, property in the copyright; and secondly, the right to sue.

In respect of the right to sue, registration, as I have pointed out, is necessary. I come, therefore, to the conclusion that the Plaintiffs, in order to have a right to sue, must register in accordance with sect. 4 of the *Copyright Act*, 1862. [His Lordship then considered the question whether registration had been effected in accordance with the Act of 1862, and came to the conclusion upon the evidence that the entry of the 1st of February, 1890,

constituted a sufficient registration under that Act, and he continued:—]

Then comes the question whether there is any reason why an injunction should not be granted. Now, the evidence is that the Plaintiffs intend to bring over their panorama and exhibit it here. If I were to allow this panorama, which is now here, to go on and be exhibited for a considerable time, as in all probability it would, it is obvious that the result might be that many persons might go and see it who would not care to go and see the other panorama, and that the rights of the Plaintiffs might thus be injured. I think therefore on the whole that, being of opinion that there has been an infringement, and that the Plaintiffs have a right to sue in respect of it, I ought on the usual terms to grant an injunction, until the trial or further order, restraining the Defendants, their servants, workmen, and agents, from making, publishing, or permitting to be made or published, any copy of the panorama now being exhibited or any copy or colourable imitation of the Plaintiffs' panorama registered under the *Copyright Designs Act* on the 1st of February, 1890.

March 14. By consent the injunction was on this day made perpetual, and the Defendants ordered to pay the costs.

Solicitors: *Sharon G. Turner; Blair & W. B. Girling.*

W. W. K.

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April 10.

JOHN MORLEY BUILDING COMPANY *v.* BARRAS.

[1891 J. 124.]

Company—Incorporation without Articles of Association—Subscribers of Memorandum of Association—Directors—Meetings of Subscribers—Notices—Companies Act, 1862, *s.* 67; *Table A, arts.* 35, 52, 53, 58, 62, 71 [*Revised Ed. Statutes, vol. xiv., pp.* 217, 255, 256, 257, 258].

Art. 58 of Table A to the *Companies Act*, 1862, providing that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office," does not apply to mere *de facto* directors; nor does it apply to subscribers of the memorandum of association who, not having appointed directors under art. 52, are (by art. 53) "deemed to be directors"; it only applies to directors who have been duly appointed under the articles.

Art. 62 does not apply so as to continue mere *de facto* directors as directors till the ordinary meeting in the year next after that in which a meeting has been held at which an election of directors ought to have taken place, when no directors have been elected either at such earlier meeting or the adjournment thereof.

The power given by art. 52 to the subscribers of the memorandum, to determine who shall be the first directors, remains in force notwithstanding the first ordinary meeting after registration and the adjourned meeting held seven days afterwards, have been held without any directors being appointed thereat.

Art. 35, prescribing seven days' notice for summoning a meeting, only applies to general meetings of the company. Table A contains no special provision as to summoning meetings of subscribers of the memorandum of association, and only reasonable notice of such meetings is necessary.

THE *John Morley Building Company* was registered as a company with limited liability under the *Companies Acts*, 1862 to 1889, on the 6th of March, 1890.

There were no articles of association.

The memorandum of association was signed by twelve persons, viz., *W. T. Cooler, W. H. Mayhew, J. H. Matthews, F. G. Matthews, D. Weston, A. Matthews, R. Sharland, W. Cockerill, H. Hadley, F. Sharp, H. V. Cooler*, and *J. Bennett.*

The first general meeting of the company was held on the 3rd of September, 1890, and adjourned to the 25th of September, 1890; but at neither meeting were any directors appointed.

The subscribers of the memorandum as a body had not in the meantime acted as directors or appointed other persons as directors; but *W. T. Cooler, W. H. Mayhew, D. Weston,* and four other gentlemen, *H. Rumney, Brown, Broadberry,* and *Hawthorne* (the last four not being signatories of the memorandum), acted as directors of the company.

On the 29th of December, 1890, *J. H. Matthews,* the secretary to the company, being advised that a meeting of the subscribers of the memorandum should be summoned, issued a circular to them stating that a meeting of the subscribers of the memorandum would be held on the 31st of December, 1890, at a place and time named, to consider the present position of the company, to appoint directors, to allot shares, and for general business.

This meeting was attended by ten of the subscribers, viz., *J. Bennett, F. Sharp, J. H. Matthews, A. Matthews, F. G. Matthews, W. T. Cooler, D. Weston, W. H. Mayhew, R. Sharland,* and *W. Cockerill.* Only formal business was transacted, and the meeting was adjourned for fourteen days.

On the 10th of January, 1891, *J. H. Matthews,* on a request from *Rumney,* issued a circular to the subscribers stating that a meeting of them would be held on the 12th of January at a place and time named.

This meeting was attended by ten of the subscribers, viz., *J. Bennett, A. Matthews, F. Sharp, J. H. Matthews, F. G. Matthews, W. Cockerill, R. Sharland, D. Weston, W. H. Mayhew,* and *H. Hadley.*

Weston and *Mayhew* handed in a written protest against the holding of the meeting, and then withdrew. The rest of the subscribers appointed the Defendants in the present action, viz., *H. Barras, J. Bennett, J. H. Matthews, F. G. Matthews, W. Rees, R. Sharland,* and *F. Sharp,* directors; *H. Pitcher,* secretary; and *J. C. F. Barfield,* solicitor.

On the 12th of January, 1891, *W. T. Cooler, H. V. Cooler, W. H. Mayhew, H. Hadley, W. J. Cockerill, D. Weston,* and *R. Sharland,* signed a document, which was as follows: "We, the undersigned, being signatories of the memorandum of association of the *John Morley Building Company, Limited,* hereby determine and nominate as the first directors of the said company the

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following: Mr. *Charles Brown*, Mr. *W. H. Mayhew*, Mr. *W. Cooler*, Mr. *Howard Rumney*, Mr. *H. Hawthorne*, Mr. *D. Weston*." On the evidence, however, his Lordship thought that three of the signatures were obtained in a way which invalidated the appointment.

On the 24th of January, 1891, a writ was issued by Messrs. *Hammond & Richards*, solicitors, in which the company were named as Plaintiffs, and *H. Barras*, *J. Bennett*, *J. H. Matthews*, *F. G. Matthews*, *W. Rees*, *R. Shiarland*, and *F. Sharp*, the persons appointed directors at the meeting of the 12th of January, 1891, were named as Defendants.

The claim indorsed on the writ was for "an injunction to restrain the Defendants and each of them from holding himself or themselves out as acting directors of, or constituting the board of directors of, the Plaintiff company, and from interfering in or intermeddling with, or from attempting to interfere in or to intermeddle with, the directorship or affairs of the Plaintiff company, or from dealing with the funds or banking account of the Plaintiff company."

On the 10th of March, 1891, notice was given by the solicitor instructed by the Defendants of a motion "on behalf of the *John Morley Building Company, Limited*, the Plaintiffs named in the writ of summons," for an order that all proceedings in the action might be stayed, "the same having been instituted without the authority of the applicants"; that the Defendants' costs of the action might be taxed, and that Messrs. *Hammond & Richards* might be ordered to pay such costs to the Defendants; and that Messrs. *Hammond & Richards* might be ordered to pay the applicants their costs of the action and of the present application, to be taxed as between solicitor and client.

Hastings, Q.C., and *D. L. Alexander*, in support of the motion:—

The company having been incorporated without articles of association, its proceedings are regulated by Table A to the *Companies Act*, 1862, and by art. 53 of Table A, "until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." There were no directors, other than the subscribers, before the 1st of January, 1891,

though other persons purported to act as directors. Some of the signatures to the document of the 12th of January, 1891, were obtained by a trick; but if all the signatures had been properly obtained there was no meeting of the subscribers, and only seven signed the document, and that is not a proper appointment of directors under art. 52, which provides that "the number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." "Subscribers" means all or a majority of the subscribers, if assembled at a meeting duly convened, or all the subscribers when making an appointment in writing without meeting: *In re Great Northern Salt and Chemical Works* (1). On the 10th of January, 1891, a meeting of subscribers was duly convened at which a majority of the whole subscribers duly appointed the Defendants to be directors. Although the present motion is on behalf of the company, it is authorized by the Defendants as directors, and they are entitled to the order for which they ask, and which is similar to that which was made in *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (2).

Buckley, Q.C., and *Quin*, for *Hammond & Richards* and the persons nominated as directors in the document of the 12th of January, 1891:—

The subscribers of the memorandum did not act as directors; but certain persons mentioned in the prospectus were assumed to be directors, called meetings, allotted shares, and were *de facto* directors. Their acts cannot be called in question, for by art. 71 "all acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid . . . be as valid as if every such person had been duly appointed . . . to be a director." Things went on in this way till the first ordinary meeting, when, according to art. 58, "the whole of the directors shall retire from office." By art. 61, the company, at the general meeting at which the directors retire is to fill up the places of the retiring directors. The

(1) 44 Ch. D. 472. (2) 13 Ch. D. 310.

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directors then were either the *de facto* directors or the subscribers of the memorandum. No persons were appointed directors at the general meeting or any statutory adjourned meeting, and therefore art. 62 applies, which provides that in such a case "the vacating directors or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year." Art. 71 validated the appointment of the *de facto* directors, and the effect of art. 62 is that they are re-elected. The only alternative is that the subscribers or directors retired from office and were re-elected; but the other construction is more reasonable. The whole frame of the regulations is to let the company elect its own directors, and doing nothing at the first ordinary meeting or the adjournment is equivalent to an affirmative vote re-electing the *de facto* directors. The so-called meeting of the 12th of January was not duly convened; the seven days' notice required by art. 35 was never given.

[STIRLING, J.:—That applies to general meetings of the company.]

The persons attending the meeting of the 12th of January were assuming to act as corporators, and to do an act binding the corporation they must give seven days' notice. The notice not having been given, the subscribers are not bound, and the Defendants are not directors. The company, however, may have power to appoint directors, and a general meeting should be summoned. If the power is in the subscribers, they must exercise their authority by all appointing, or by a resolution at a meeting duly convened.

Hastings, in reply:—

The persons assuming to act may be *de facto* directors as regards outsiders, but not as against the subscribers of the memorandum. They were not directors when the first ordinary meeting was held, and have not become so by what has been omitted to be done. They had nothing to say when the subscribers met to determine who should be directors. It is sufficient to summons the subscribers to a meeting; you cannot drag them there.

[STIRLING, J.:—Was two days' notice sufficient?]

There is no evidence that any of those summoned thought the notice insufficient.

[He was stopped.]

STIRLING, J.:—

This is rather a peculiar motion; but it is founded on the case decided by the Court of Appeal, of *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1), and the real question raised is, Who are the directors of the *John Morley Building Company, Limited*?

The action is brought in the name of the company against certain gentlemen, asking for an injunction to restrain them from holding themselves out or acting as directors, and from intermeddling with the affairs of the company or dealing with its funds. That claim has been met by the present motion, which is also made in the name of the company, asking that all proceedings in the action may be stayed on the ground that the same has been instituted without the authority of the applicants, and that the solicitors whose names appear on the writ of summons may be ordered to pay the costs. The real applicants are, no doubt, the Defendants, and I have to decide whether they have been appointed directors of the company.

The company was incorporated under Table A to the *Companies Act*, 1862, art. 52 of which is as follows: "The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." Art. 53 says, that "until directors are appointed the subscribers of the memorandum shall be deemed to be directors"; and art. 58, so far as material, provides, that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office."

The first ordinary meeting of the company was held on the 3rd of September, 1890, and the adjourned ordinary meeting on the 25th of September, 1890; but nothing was done at either meeting.

In the meantime no directors had been appointed by the

(1) 13 Ch. D. 310.

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subscribers to the memorandum of association, nor had they acted as directors; but certain gentlemen had constituted themselves directors of the company and proceeded to act as such. Under art. 71 of Table A, and s. 67 of the *Companies Act*, 1862, their acts may, as regards strangers, be binding upon the company; but in point of fact they were never duly appointed directors of the company. After a time a dispute arose, in which Mr. *Rumney*, one of these gentlemen, took one side, and Mr. *J. H. Matthews*, one of the subscribers to the memorandum and secretary to the company, took the other side, and the present motion is the result of the quarrel. Mr. *Matthews*, on the 29th of December, 1890, being advised that the proper course to be taken was to hold a meeting of the subscribers to the memorandum, issued a circular calling a meeting for the 31st of December, 1890. That notice was sent to each subscriber, and a meeting was held at which, according to the evidence, ten out of the twelve subscribers were present. No appointment of directors was made at the meeting, but it was adjourned for fourteen days.

Mr. *Matthews* says that in the meantime he received a letter from Mr. *Rumney* asking him to call a meeting of the subscribers. He accordingly, on the 10th of January, issued a circular calling a meeting of the subscribers for the 12th of January, 1891. On the day fixed ten subscribers attended; two of them delivered a written protest and withdrew, but the other eight remained. The number of signatories to the memorandum being twelve, there was, therefore, still a majority present. The defendants were then elected directors of the company, and duly elected if that meeting was duly constituted.

What was done by the other side—the gentlemen who have been called the *de facto* directors—was as follows: they attempted to get themselves appointed directors by a document which was signed by only seven of the subscribers, and therefore was not sufficient within art. 52. On the evidence, the signatures of three of those who signed were obtained in a way which seems to invalidate the appointment; but I need not decide that point, for if all the signatures were good the document is not a valid appointment of the first directors. Have the persons named, then, a title in any other way? Mr. *Buckley* says they were

de facto directors down to the holding of the first meeting, that art. 58 applies to them, and that as directors they then retired from office. Then he says, that as no directors were then or at the adjourned meeting appointed in their places, art. 62 applies to the *de facto* directors, and that as "vacating directors" they continue in office until the ordinary meeting in the next year. But does that article apply to persons who are only *de facto* directors? It seems to me that it applies only to those directors who have been validly appointed in pursuance of the articles; when no appointment at all has been made, the article either does not apply at all, or if it does it only provides that the vacating directors shall continue in office, and does not confer on them any better title to office than they had before. Therefore, the *de facto* directors do not derive any authority from that clause as against directors duly appointed.

Then it is said that, if that is the correct view, under arts. 53 and 62, the first ordinary meeting having passed without anything being done, the subscribers of the memorandum remain directors, and must continue as such till the first ordinary meeting in the next year. But I do not think that that argument holds good, for art. 58 says, that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office"; and art. 53 says, that "until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors." The subscribers are not directors, but only to be deemed such: and in my opinion, art. 58, read with arts. 53 and 62, means that the whole of the appointed directors shall retire, and has no application to the subscribers of the memorandum.

But have the subscribers lost the power, given them by art. 52, of determining who shall be the first directors of the company, by the fact that the first general meeting has been held? I think they have not. Until an appointment of directors has been made, the power given by art. 52 remains in force, and in January, 1891, the subscribers of the memorandum were the persons having the power to appoint directors.

Has the power under art. 52 been properly exercised? It has been contended that proper notice of the meeting of the 12th of

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January was not given because the subscribers did not receive the seven days' notice prescribed by art. 35 in the case of summoning general meetings. It is said that the subscribers of the memorandum of association, when proceeding under art. 52, are bound to conform themselves to the regulations as to general meetings, including art. 35. But that article does not apply at all to meetings of the subscribers; it only applies to general meetings of the company. There is no special provision in Table A as to convening meetings of subscribers of the memorandum, and therefore I must hold that only reasonable notice is required. Was a two days' notice sufficient? Ten members attended, the absentees being two gentlemen named *Cooler*. On another occasion only two days' notice was given, and one of these gentlemen then attended the meeting. But, in addition to that, one of them has made an affidavit on this application, and has made no complaint that the notice was insufficient. Under the circumstances, I think that a reasonable notice was given.

The result is, in my opinion, that the Defendants were duly chosen directors of the company, and the motion succeeds. The order must go in the form pointed out in *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (1).

Solicitors: *J. C. F. Barfield; Hammond & Richards.*

(1) 13 Ch. D. 310.

F. E.

In re FOREIGN AND COLONIAL GOVERNMENT TRUST COMPANY.

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April 11, 21.

[1891 F. 097.]

Company—Memorandum of Association—Alteration of Objects—Extension to New Business—Sanction of Court—Conditions—Companies (Memorandum of Association) Act 1890 (53 & 54 *Vict. c.* 62) *s.* 1, *sub-ss.* 3, 5 (*d.*)

The memorandum of association of the "*Foreign and Colonial Government Trust Company,*" incorporated in 1879, stated one of its objects to be to invest money in securities of foreign, or colonial, or British Governments, including municipal, ruling and public authorities, and shares and obligations of undertakings guaranteed by such Governments.

As the capital could no longer be advantageously invested in the securities mentioned in the memorandum, the Court was asked to confirm a proposed alteration therein, extending the class of investments to securities, bonds, debentures, and debenture stock, obligations, and mortgages of companies and corporations formed or incorporated under British, foreign, or Colonial law:—

Held, that, within sect. 1, sub-sect. 5 (*d*) of the *Companies (Memorandum of Association) Act*, 1890, "the business of the company" was the investment of money in the limited class of securities mentioned in the memorandum; that investment in the class specified in the proposed alteration was also a business which might be "combined with the business of the company;" and that the proposed alteration ought to be sanctioned; but subject to the condition that the name of the company should be so altered that persons dealing with it might not be misled into supposing that its investments were limited to Government securities.

In re Governments Stock Investment Company (1) distinguished.

THE *Foreign and Colonial Government Trust Company, Limited,* was incorporated on the 15th of March, 1879, under the *Companies Acts,* 1862 to 1877, with a nominal capital of £2,499,983 10*s.*, divided into 92,872 preferred and deferred shares.

The objects of the company, as specified in sect. 3 of the memorandum of association, were (*inter alia*):

"(*c.*) To invest money in the purchase of, or otherwise acquire and hold any bonds, stocks, obligations or securities, of foreign or colonial, or British Governments, States, dominions, sovereigns, provinces, municipalities, or ruling or public authorities,

(1) [1891] 1 Ch. 649.

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or the shares or obligations of foreign railways, or other undertakings; having the guarantee of or subsidized by a foreign or colonial, or British Government, State, dominion, sovereign, province, municipality, or ruling or public authority, or any other security for the payment of which the credit, or any property or revenue of any such Government, State, dominion, sovereign, province, municipality, or ruling or public authority is pledged, charged, or made liable."

At an extraordinary general meeting held on the 6th of February, 1891, the following resolution was passed:

"That the memorandum of association of the company be altered by writing after clause (*c.*) of the present memorandum of association of the company, the following clause C 1, and that the memorandum of association of the company shall be read and continued as if the following clause C 1 were part of the original memorandum of association of the company.

'*C* 1. In addition to the previous powers, to invest the moneys of the company for the time being in, or lend the moneys of the company on the security of, or otherwise to acquire and hold, any bonds, debentures, debenture stock, obligations, or mortgages of any companies or corporations formed or incorporated under British, foreign, or Colonial law.'"

This resolution was confirmed at an extraordinary general meeting of the company held on the 23rd of February, 1891, and was registered on the 10th of March, 1891, with the Registrar of Joint Stock Companies.

A petition was presented by the company—intituled in the matter of the company, of the *Companies Acts*, 1862 to 1890, and of the *Companies (Memorandum of Association) Act*, 1890, stating that the consent of all the creditors to the proposed alteration had been obtained, and that such proposed alteration was required in order to enable the company to carry on its business more efficiently, and that it would be much for the benefit of the company that the proposed alteration should be confirmed by the Court; and praying for such confirmation.

The evidence in support of the petition was (*inter alia*) to the effect that the securities authorized by the memorandum had so

altered in value since the incorporation of the company, that if money were invested on them at the present time, it would not yield anything like the remuneration or profit, which it would have done if invested in the same securities at about the time when the company was incorporated; that the consent of certain creditors to the proposed alteration had been obtained; and that the rest of the creditors were creditors in respect of unclaimed dividend warrants, whose claims amounted to £764 6*s.*, to meet which last-mentioned claim the company had set aside funds.

Buckley, Q.C., and *E. Cecil*, in support of the petition:—

The scheme of the *Companies (Memorandum of Association) Act*, 1890 (53 & 54 Vict. c. 62), is that the company, by special resolution, shall determine how its objects, as defined by the memorandum of association, are to be altered. The duty of the Court is to protect the interests of everybody, including creditors and minorities. Subject to these limits, the Court leaves the matter in the hands of the shareholders. Practically, the only creditors of this company are the holders of some unpaid dividend warrants. There was only one dissentient shareholder at the first meeting, and no dissentient at the meeting of the 23rd of February. In the case of *In re Governments Stock Investment Company* (1), Mr. Justice *Chitty* seems to have thought that such an alteration as is now proposed was not within the Act; but his attention could not have been drawn to sect. 1, sub-sect. 5, sub-clause *d*, which enables the Court to sanction an alteration required to enable the company "to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company." Moreover, in the case cited protection was required for a certain class, the debenture stock holders, which does not exist in the present case. Sect. 1, sub-sect. 3, enables the Court to give its confirmation subject to conditions; and the company is willing, if required, to alter its name, and advertize such alteration in the *London Gazette* and the newspapers, so that those dealing with the company may not be misled.

(1) W. N. (1891) 48; now fully reported [1891] 1 Ch. 649.

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This is a petition under a recent statute—the *Companies (Memorandum of Association) Act*, 1890—asking that certain resolutions, which have been passed by the company, for the alteration of the provisions of its memorandum of association, may be confirmed by the Court.

The company was formed some time ago for the purpose of acquiring the shares in the business of a company called the "*Foreign and Colonial Government Trusts*," and to receive the moneys, investments, and securities to which that company would become entitled, and also to invest money as follows. [His Lordship read clause (*c*) of sect. 3 of the memorandum of association, and continued:]—

Speaking broadly, the authorized investments are in the bonds, stocks, obligations or securities of foreign or colonial governments, including municipalities and public authorities, and shares or obligations of foreign railways and undertakings guaranteed by a foreign, colonial, or British government, municipality, or public authority. The capital of the company is of a very considerable amount, being close on £2,500,000.

The company has carried on business for a considerable time, and the state of circumstances which is now brought under my notice is this: that through changes in the value of the securities which are authorized, as investments for the money of the company, by clause (*c*) of sect. 3 of the memorandum of association, it is no longer possible advantageously to invest the large capital of the company in securities of that limited class. Accordingly the company has passed this special resolution. [His Lordship read the resolution, and continued:]—

There are no debentures or debenture stock holders. The only creditors are practically the officers and directors of the association. The sums due to them are small in amount, and they are unanimous in agreeing to the proposed alteration in the memorandum of association. The resolution has been carried unanimously, for although one shareholder at first dissented from, he has now expressed his assent to the proposed change.

I have to see, in the first place, whether the case falls within sub-sect. 5, of sect. 1, of the Act, which is in these terms: "The

Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company if it appears that the alteration is required in order to enable the company" to do certain things, which are arranged under heads (*a*), (*b*), (*c*), (*d*), and (*e*). The present application is sought to be brought under (*d*), which is: "To carry on some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company."

Now, first of all, what is the "business of the company"? I think that the business of the company is the investment of the assets of the company in the limited class of securities mentioned in clause (*c*) of sect. 3 of the memorandum of association; in that respect I take the same view as that which I understand to have been expressed by Mr. Justice *Chitty* in the case of *In re Governments Stock Investment Company*, decided on the 5th of March last, and at present only reported in the *Weekly Notes*. I have, however, seen the proof-sheet of the full report which will shortly appear in the "Law Reports" (1). That being so, is what is proposed to be done the carrying on of "some business or businesses which, under existing circumstances, may conveniently or advantageously be combined with the business of the company"? What is proposed to be done is to enable the company to invest the money and assets of the company in another class of securities; and if the business of the company be, as I think, the investment of money in one limited class of securities, it appears to me that the investment of the money of the company in another limited class of securities must also be a business which may be combined with the business of the company.

However, upon this part of the case a question has been raised which induced me to suspend my judgment. It would seem from the note of *In re Governments Stock Investment Company*, contained in the *Weekly Notes*, that Mr. Justice *Chitty* had expressed an adverse opinion with regard to the meaning of sub-clause (*d*) of sect. 1, sub-sect. 5; but examination of the full report of that case, and communication with the learned Judge, have satisfied me that Mr. Justice *Chitty* expressed no opinion whatever upon this point. It was not seriously contended before

(1) Now reported [1891] 1 Ch. 649.

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him, probably because the facts did not afford a basis for the argument, that the alteration proposed in the case of *In re Governments Stock Investment Company* (1) fell within sub-clause (*d*), and Mr. Justice *Chitty* expressed no opinion on the matter one way or the other. I think that under sub-clause (*d*) the proposed alteration may be made, provided the "existing circumstances" are such as to shew that the proposed new business "may conveniently or advantageously be combined with the business of the company." Of course, that is a matter of evidence, and here the result of the evidence appears to me to be this, that under present circumstances the large capital of the company can no longer be advantageously invested on the limited class of securities specified in clause (*c*) of sect. 3 of the memorandum of association. That being so, it appears to me that the Court has jurisdiction to confirm, either wholly or in part, the alteration. There are no special circumstances, such as occurred in the case of *In re Governments Stock Investment Company*, which would induce me to exercise my discretion adversely to the application; but, under sub-sect. 3 of sect. 1 of the Act, the Court has power to confirm the alteration "on such terms and subject to such conditions as to the Court seems fit." I think there is one condition which ought to be imposed. The name of the company is the "*Foreign and Colonial Government Trust Company.*" That might lead a person dealing with the company to suppose that the company had only power to invest in the securities of foreign and colonial governments. The company is now taking wider powers, and I think it ought to alter its name so that it may not mislead, or be liable to mislead persons who deal with the company, but do not take the trouble to examine the memorandum of association as altered. I propose, therefore, to make the order, but subject to this, that the name of the company be altered in such a way as to the company may seem fit, so long as the name does not produce the effect of misleading any person. It occurred to me that "*Foreign and Colonial Government and Corporation Trust Company*" might be the new name, but it is for the company to select it, due regard being paid to the names of existing companies. I do not mean the order to come

(1) [1891] 1 Ch. 649.

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into operation until the name is changed, and the petition must stand over generally, to enable the company to take the necessary steps to alter its name, with liberty to apply. The amount in hand, £764 6*s.*, in respect of unpaid dividend warrants, must be set apart for the purpose of paying the creditors.

Solicitors: *Norton, Rose, Norton & Co.*

F. E.

BENGAL SECRETARIAT LIBRARY.

KEKEWICH, J.

1891

April 11.

In re COLMAN'S TRADE-MARKS.

Trade-mark—Registration—Practice—Alteration of Register by omitting Words "Trade Mark"—Terms on which Leave granted—Patents, Designs, and Trade Marks Acts, 1883 *and* 1888 (46 *and* 47 *Vict. c.* 57, *ss.* 64, 74, 92; 51 *&* 52 *Vict. c.* 50, *s.* 10).

Labels registered as trade-marks under the *Patents, Designs, and Trade Marks Act,* 1883, contained with other matter the words "*trade mark,*" so placed as to appear to refer specially to some device on the mark, as, for instance, in one case to a bull's head. In consequence of the observations of *Fry,* L.J., in *In re Apollinaris Company's Trade-marks* (1), the owners of the marks applied for leave to alter the registration by striking out the words "*trade mark*":—

Held, that, as a condition of granting the application, the Court ought to impose upon the applicants terms in accordance with the provisions of the *Patents, Designs, and Trade Marks Act,* 1888, s. 10, namely, that the applicants should undertake to indorse on their application, and enter on the register, a statement of the essential particulars of each mark, and a disclaimer of the exclusive right to the added matter (if any), to the satisfaction of the Comptroller.

THE Applicants, the Messrs. *Colman,* of *Norwich,* were the owners of (among others) seventeen registered trade-marks, which consisted of various labels used by them, containing thereon, in each instance, the words "*trade mark.*"

In all of these labels the words "*trade mark*" were used in such a manner as to appear to refer to a particular part of the label consisting of a bull's head, as being the essential part of the trade-mark; but the labels comprised other matter of a distinctive character.

Two of the marks were registered as old marks, and the others as new, but all were registered under the *Patents, Designs, and Trade Marks Act,* 1883.

The observations of *Fry,* L.J., in delivering judgment in the case of *In re Apollinaris Company's Trade-marks* (1), had induced the apprehension that, where the words "trade-mark" were contained in a label or other mark in such a way as to appear to refer to a particular part of the mark as being the

(1) *Ante,* p. 186.

essential part, the owner might lose protection for the mark as a whole.

This was a motion on behalf of the Applicants that leave might be given to alter the registration of the seventeen trade-marks by striking out of each of such marks the words "*trade mark*" wherever the same appeared therein; and the only question which was now argued was as to the terms upon which such leave should be granted, the application not being opposed on behalf of the Comptroller, provided proper conditions were imposed as regarded such of the marks as were not old marks.

It was stated that the rule to be now laid down by the Court would govern many hundreds of cases of a similar kind.

Cozens-Hardy, Q.C., and *Sebastian*, for the Applicants:—

The object of this application is solely to remove a doubt which has been caused by the observations of Lord Justice *Fry* in the case of *In re Apollinaris Company's Trade-marks* (1), viz., that by reason of the use of the words "*trade mark*" in proximity to an essential part of these labels, as, for instance, in the case of the bull's head, the mark is calculated to mislead, as pointing to the conclusion that that part, and that part alone, is the trade-mark. The Court, under sect. 92 of the Act of 1883, has power to refuse or grant the leave now asked for on such terms as it may think fit; and it is submitted that the Court will not impose upon the Applicants, as a condition of granting the leave, any more stringent terms than those which were in force under that Act, being the Act under which the registration of all these marks took place; and that, therefore, the Applicants ought not to be required to make any further disclaimer than that indicated in sect. 74 of the Act of 1883—that is to say, a disclaimer of the right to the exclusive use of matter common to the trade in the goods with respect to which the application is made. The Comptroller, however, seeks to impose upon the Applicants conditions which were introduced for the first time by the Act of 1888, by requiring them (in accordance with sect. 10 of that Act) to state the essential particulars of their trade-marks, and disclaim any right to the exclusive use of the added matter (if

(1) *Ante*, p. 186.

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any). This, we submit, is going beyond what ought in fairness to be required.

The Attorney-General (Sir *R. E. Webster*), and *Ingle Joyce*, for the Comptroller:—

The offer made by the Applicants is insufficient for the protection of the public. It is of importance that undue weight should not be attached to the observation of Lord Justice *Fry*, in the case cited, which was made with reference to the particular label there in question, on which the words "*trade mark*" were placed immediately under a red disc which was the only essential part of the label, everything else on the label being absolutely common property. It is, however, no part of the duty of the Comptroller to consider whether the Applicants are or are not well advised in coming to the Court. That is a matter for their discretion. But they come for indulgence, and the question is on what terms the Court should grant it. In the case of the bull's head, which may be taken as a convenient example of all the trade-marks in question, the Applicants when they registered thought it was desirable to tell the public that a part of the label, namely, the bull's head, was essential in the sense of being their independent trade-mark; they said in effect to the public, "This is our label, and this is our trade-mark on the label." No doubt they had a right to register the whole label, and no doubt such a right is important with reference to what is termed the "get-up" of the label. But in 1883 the distinction between the essential and non-essential parts of labels was thoroughly well-known, and was recognised and adopted by the Legislature, as appears from sects. 64 and 92 of the Act of 1883. The Applicants with this knowledge put upon their labels a notification that the bull's head was their "*trade mark*," and if they now seek to remove that notification it must be upon the ground that the public would be misled, if the words were allowed to remain, into supposing that the bull's head was the only part of the trade-mark to which the Applicants were entitled, whereas in fact there were other essential parts of the mark. Therefore, if the words "trade mark" are deceptive, they must be so in respect of parts of the mark which are essential, and not in respect of those

which are not essential. The legal consequence of the judgment of Lord Justice *Fry* is this, that these Applicants have for a series of years told the public that the bull's head is the essential feature of the "*trade mark.*" If they cease to give that information, they ought to tell the public which parts of the mark are essential, and which are not, so that the public may know which parts they may take and which they may not. In considering what terms are to be imposed the Court will, it is submitted, be guided by what the Legislature has by sect. 10 of the Act of 1888 required in the parallel case where an applicant for registration seeks to add non-essential particulars to the essential particulars composing his mark, namely, that he should state in his application the essential particulars of the mark and disclaim in his application any right to the exclusive use of the added matter, and that a copy of the statement and disclaimer should be entered on the register. It is essential for the public, who if leave to expunge the words "*trade mark*" is granted will no longer have a guide in the label itself, that there should be on record something which will shew what is the essential part of the label. The proposed disclaimer will not deprive the Applicants of any right to which they are entitled, while on the other hand, in the absence of such disclaimer, they might acquire a right to protection in respect of words, such for instance as the words "*oblong blue,*" which form part of one of their marks, and are now clearly not entitled to protection *per se.* It would not be fair, that under colour of curing a defect in their own label, they should be permitted to acquire any such right to the prejudice of the public.

[They referred to *In re Farrow's Trade-mark* (1).]

Cozens-Hardy, in reply:—

The Applicants have never claimed exclusive right to the use of any words such as "oblong blue." What they are entitled to by registration of their label is not the particular words, but the use of the words as part of the whole. No reason has been shewn why the Court should require any other terms than such as could have been imposed at the date of the original

(1) W. N. (1890), 113; 7 Rep. Pat. Cas. 260.

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application for registration. [He referred to *In re Hudson's Trade-marks* (1), and *In re Atkins' Trade-mark* (2).]

KEKEWICH, J.:—

It is not for me to determine whether the Applicants are well advised in making the application which they do to the Court, nor to consider whether or not the remarks of Lord Justice *Fry* govern the trade-marks in question here. That was entirely a question for the Applicants to consider before they made their application. They have considered it, and without, of course, in the least degree admitting that they are affected by the Lord Justice's remarks, they entertained a doubt whether they would be able to sustain these labels if hereafter attacked, by reason of those remarks, and therefore they make their application. They come, therefore, under an Act which enables the Court to do what is just towards them, but, at the same time, to do it upon such terms as the Court thinks fit, and subject, of course, to the right of appeal, they cannot complain of any terms which the Court thinks fit to impose. Argument, of course, there may be, as to the reasonableness of any particular terms; but they come for an act of grace. I confess that if this had been severely contested on the part of the Comptroller, I should have been indisposed to allow any alteration at all, and for this reason. Quite apart from what the Lord Justice says, it seems to me clear that the Applicants have in their registered trade-mark signified that the bull's head is, as the Attorney-General said, one of the essential parts of the trade-mark, and I think they have done more. I think they have said, putting into English what we are familiar with as schoolmen in Latin, that the bull's head is that without which the trade-mark is not. It is not only that it is one of the essential parts, but that the other essential parts by themselves would not give them sufficient protection, and therefore it seems to me that, at any rate, they are justified in entertaining the doubt, and they have placed the Comptroller and the Court in a difficulty, because they seek to alter that which up to this time they represented in the way which I have stated. Now, when that word "*trade-mark*" is expunged—that

(1) 32 Ch. D. 311. (2) 3 Rep. Pat. Cas. 164.

is to say, when the application has been granted, what will remain as the essential parts? Who can tell? We know now, at any rate, that there is one essential part. We really know no more, except, of course, that, as the Attorney-General has pointed out, there is the get-up of the whole label. Whether with a representation of the blue boy, or other devices, there is that which is open to, or rather to be protected against, imitation. But when the words "*trade mark*" are gone, we cease to be told that the bull's head is the essential part. It seems to me that some such considerations must have been present to the mind of the draftsman of this sect. 92, which is in the Act of 1883, and remains in the Act of 1888, because what the application may be directed to is the addition or alteration of a mark in any particular not being an essential particular within the meaning of the Act, and the preservation of the essential particulars is a necessary incident to the application. Therefore, I think, the offer made by Mr. *Cozens-Hardy* does not go far enough, and I think that the suggestion of the Attorney-General is required in order to meet the justice of the case—that is to say, in order to protect the public. It is quite true that when that has been done information will not be given to the public, even, as I understand, in the *Trade-marks Journal*, and certainly not in the certificate; the label will go forth to the world as a whole, and as being, as a whole, the trade-mark; but there will be this important result, that if Messrs. *Colman* thereafter come to protect themselves against the infringement, then they will not be entitled to say this or that is an essential part. They will be bound down by the declaration which it is suggested they should make now, and what they now declare to be essential will be essential, and what they do not declare to be essential will not be essential, and all difficulty about that will be removed. Then Mr. *Cozens-Hardy* relies upon the fact that he registered under the Act of 1883, and he says that no greater term should be imposed on him than could have been imposed under the Act under which he registered, and that I must go back and consider the application as made at the date of the registration. I think it is a sufficient answer to that to say that he, coming now for an act of grace, must take it on the proper

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terms according to the law of the present day. I need not discuss the question of the old marks before 1875, because the Attorney-General admits that no alteration beyond that which the Applicants themselves wish is required as regards those. But as regards the others I think that they ought to state now as a condition of expunging the words "trade mark" what are and what are not the essential particulars of the label, and with that I think the matter had better go back to the Comptroller.

I quite recognise that the task of going into and discussing the details now would be, as the Attorney-General said, ridiculous, and ridiculous certainly in this sense, that it would be impossible, and I also recognise the extreme desirability of my making nothing more than general remarks, because these points may be raised again in many other cases, and I do not think I ought to do more than express an opinion of a general character.

[The application was granted, "the Applicants undertaking to indorse on their application, and enter on the register a statement of the essential particulars of each mark, and a disclaimer of the exclusive right to the added matter, if any, to the satisfaction of the Comptroller, with liberty to apply to the Court in case of difference. The Applicants to pay the costs of the motion."]

Solicitors: *Flux & Leadbitter*, agents for *W. H. Tillett & Co., Norwich; Hare & Co.*, Solicitors for the Board of Trade.

C. C. M. D.

HARRISON *v.* SOUTHWARK AND VAUXHALL WATER COMPANY.

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May 5, 6, 7, 11.

[1890 H. 3681.]

Nuisance — Noise — Water Company — Negligence — Waterworks Clauses Act, 1847 (10 & 11 *Vict.* c. 17), s. 12 [*Revised Ed. Statutes, vol. x., p.* 62].

The Defendants, in the exercise of their statutory powers, sunk a shaft in land adjacent to the Plaintiff's house, and for this purpose employed certain lift-pumps, the noise of which seriously interfered with the Plaintiff's comfort. The Plaintiff having commenced an action for nuisance the Defendants substituted centrifugal pumps, which diminished the noise of the pumping. When the sinking of the shaft was commenced, it became necessary to lower and lengthen the pumps from time to time, but at the date when the centrifugal pumps were substituted, the sinking of the shaft had arrived at a point at which this operation had ceased to be necessary. The Defendants might have used centrifugal pumps from the commencement, but they were less convenient on account of the difficulty of lowering and lengthening them, and on account of the increased labour attending their use, and they were not the pumps ordinarily used in sinking shafts:—

Held, that the annoyance being temporary and for a lawful object did not amount to a nuisance at law.

Held, further, that the authority conferred on the Defendants to sink the shaft included all things reasonably necessary for the execution of the work.

Fenwick v. *East London Railway Company* (1) explained and distinguished.

THE Plaintiff, *David Harrison*, was the owner and occupier of a house and garden overlooking the river *Thames* in the parish of *Hampton Wick*.

The Defendants, the *Southwark and Vauxhall Water Company*, had acquired under their statutory powers a strip of land abutting on the river bounded on one side by the Plaintiff's garden, and on another side by *Kingston Bridge*, for the purpose of making a tunnel under the bed of the river in order to carry a line of pipes across the river. In the execution of these works the Defendants early in October, 1890, commenced to sink a shaft in this land, and for this purpose erected thereon certain pumping

(1) Law Rep. 20 Eq. 544.

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machinery at a distance of thirty-two yards from the Plaintiff's house.

The Plaintiff complained of the noise and vibration arising from the pumping, and brought this action for an injunction and damages.

The facts found by the Court were as follows:—

The Defendants sunk the shaft in the land adjacent to the Plaintiff's house in pursuance of the powers conferred on them by the *Southwark and Vauxhall Water Act*, 1886, and the Acts incorporated therewith (including the *Waterworks Clauses Act*, 1847), and in the execution of those powers used certain lift-pumps to pump out the land water which ran into the shaft in increasing quantities as the shaft was being sunk. The noise arising from the use of the said pumps which necessarily were kept working day and night seriously interfered with the comfort of the Plaintiff and the other inmates of the Plaintiff's house. The said pumps were kept in use for about three weeks until the sinking of the shaft arrived at a point at which it was no longer necessary to lower the pumps to any greater depth for that purpose. The Defendants in the course of sinking the shaft might have used other pumps which would have made somewhat less noise than the lift-pumps actually employed, *e.g.*, a centrifugal pump known as the *Woodford* pump, and they had in fact used two of such pumps in substitution for the lift-pumps ever since the sinking of the shaft arrived at the point of depth above mentioned. These *Woodford* pumps were not usually employed in sinking shafts and were not convenient for that purpose on account, among other things, of the difficulty of lowering and lengthening them, a process which would involve from time to time stopping the working of the pumps and allowing the water to rise in the shaft so as to cause a loosening of the earth behind the wooden lining of the shaft and consequent risk to the men employed, and also on account of the increased labour in digging at the bottom of the shaft by reason of the superincumbent water. These difficulties and this risk were capable of being overcome by the use of iron rings for the lining of the shaft and the use of two *Woodford* pumps, so that one pump might always be at work while the other pump was being lowered and

lengthened. The use of two pumps however would have involved an increase in the diameter of the shaft, and this increase in the diameter of the shaft would have required great care to avoid loosening the foundations of *Kingston Bridge* which were in immediate proximity to the narrow piece of land on which the Defendants were sinking the shaft. The Defendants were guilty of no negligence in using the pumps which they did use for the sinking of the shaft, which were the pumps ordinarily used for such a purpose even when shafts were sunk in towns and in the neighbourhood of houses.

The Defendants in the first instance intended to use lift-pumps in the shaft so long as it might be necessary to use pumps in the shaft, *i.e.*, for a period extending over many months, and in point of fact the centrifugal pumps were still at work at the date of the trial of the action. The Plaintiff through his solicitors began to remonstrate with the Defendants as to the noise caused by the pumping on the 6th of October, 1890, and the correspondence between the parties continued till the 20th of October, when the Plaintiff issued and served the writ in this action and gave notice of motion for an *interim* injunction. The Defendants on the 22nd of October gave notice to the Plaintiff of their intention to substitute centrifugal pumps for the lift-pumps previously used, and about the 28th of October did substitute the centrifugal pumps. The effect of using the centrifugal pumps was to diminish to some extent the noise of the pumping, and the Plaintiff alleged that after the change was effected the pumping caused him no serious annoyance.

Lawson Walton, Q.C., and *A. D. Maclaren*, for the Plaintiff:—

The Defendant company are liable for a nuisance in the exercise of their statutory powers, unless it is physically impossible to remove it, and that is not here contended: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1); *Metropolitan Asylum District* v. *Hill* (2).

Finlay, Q.C., and *R. J. Parker*, for the Defendant company:—

The Defendants, being authorized by the Legislature to execute

(1) Law Rep. 4 Ch. 146. (2) 6 App. Cas. 193.

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certain works, are not liable to an action for nuisance in the execution of those works in the absence of proof of negligence: *London, Brighton and South Coast Railway Company* v. *Truman* (1); *Hammersmith and City Railway Company* v. *Brand* (2). The Plaintiff has not suffered any such inconvenience as amounts to a legal nuisance: *Gaunt* v. *Fynney* (3).

Lawson Walton, in reply:—

The Plaintiff has proved the existence of a legal nuisance within the definition of the term given in *Walter* v. *Selfe* (4), and adopted by Lord *Selborne* in *Fleming* v. *Hislop* (5).

[VAUGHAN WILLIAMS, J.:—Is not time an element to be considered?]

The injury must not be "fleeting or evanescent," as was said by Lord *Esher* in *Benjamin* v. *Storr* (6); but in determining what is the meaning of these words Lord Justice *Fry* says, in *Fritz* v. *Hobson* (7), "that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is to be answered not by time, but by the effects upon the plaintiff."

Moreover, the conduct of the Defendants in removing the lift-pumps is an admission of the existence of the nuisance.

By the proviso in sect. 12 of the *Waterworks Clauses Act*, which is similar to the proviso in sect. 16 of the *Railways Clauses Act*, the company is bound to do "as little damage as can be," and it has been decided, upon the latter Act, that the plea of increased expenditure is not to be taken into consideration. The company is only authorized to do what is absolutely necessary in the execution of its statutory works: *Fenwick* v. *East London Railway Company* (8).

[VAUGHAN WILLIAMS, J.:—It will take a great deal to persuade me that where the Legislature has authorized a company to construct and maintain a railway the company are liable to an

(1) 11 App. Cas. 45, 50.
(2) Law Rep. 4 H. L. 171.
(3) Law Rep. 8 Ch. 8.
(4) 4 De G. & Sm. 315, 322.
(5) 11 App. Cas. 686, 691.
(6) Law Rep. 9 C. P. 400, 407.
(7) 14 Ch. D. 542, 556.
(8) Law Rep. 20 Eq. 544.

action for nuisance unless they can say that in the exercise of their powers they have done everything which is physically possible to minimise the annoyance to the public. They are only bound to do what is reasonably possible: *Rex* v. *Pease* (1); *Fremantle* v. *London and North Western Railway Company* (2).]

It is conceivable that the increased expenditure might be so unreasonable as to put it out of the consideration of any sensible man; but the burden of proving that is upon the Defendants. It is on the Defendants to prove that they cannot do what they are bound to do without creating a nuisance: *Attorney-General* v. *Gaslight and Coke Company* (3).

1891. May 11. VAUGHAN WILLIAMS, J. (after stating the facts, proceeded as follows):—

The Plaintiff, in my opinion, is not entitled to the injunction, or the damages which he claims. It was contended before me, on behalf of the Plaintiff, that if the noise of the pumping was physically capable of reduction by the use of the *Woodford* pump, as it, in fact, was, the Plaintiff was entitled to maintain this action, and that it was no answer to his claim for the Defendants to say that they used reasonable skill and care to avoid causing annoyance to the Plaintiff, and were guilty of no negligence. In my opinion, however, the Defendants have a good defence by reason of their use of reasonable skill and care, and the absence of negligence.

In the first place, it seems to me that if the Defendants had without statutory authority sunk this shaft and done this pumping for any lawful and ordinary purpose in the exercise of their powers as private owners of the land they would not have been responsible as for a nuisance. It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house

(1) 4 B. & Ad. 30. (2) 10 C. B. (N.S.) 89.
(3) 7 Ch. D. 217.

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for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness, or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance: *Ball* v. *Ray* (1). It seems to me, therefore, that the Defendants are, to say the least, placed by their statute in the same position as private persons. The statute, by making the sinking of the shaft *intra vires*, and therefore lawful, has enabled the Defendant company lawfully to do that which private persons may do without any statutory authority. That being so, it seems to me that the obligations of the Defendant company in respect of the sinking of the shaft are neither greater nor less than those of a private person, and that a private person would not in similar circumstances be held to have created a legal nuisance by reason of the annoyance caused to his neighbours in the pumping for the purpose of sinking the shaft, unless it could be shewn that he had neglected to take all reasonable precautions for mitigating the annoyance to his neighbours.

Let me assume, however, that the sinking of the shaft would be a nuisance if done by a private person. The statute has authorized the sinking of the shaft, but the works and the manner of the execution must be distinguished. The statute has undoubtedly authorized the work, but what has it authorized in respect of the manner of execution? The Plaintiff says that the statute has authorized the work, together with all things absolutely necessary for the execution thereof. I think not. I think that the statute has authorized the execution of the work, together with all things reasonably necessary for the execution

(1) Law Rep. 8 Ch. 467.

thereof. It was urged in argument that Sir *George Jessel* had decided, in the case of *Fenwick* v. *East London Railway Company* (1), that all that was authorized by the *Railway Clauses Act*, as incorporated in the special Acts of railway companies, was what was absolutely necessary for the execution of the statutory works; but if the case is looked at, it will be seen that it has nothing to do with the manner of execution, but only with the works authorized to be executed. So far as the manner of execution is concerned, all that is necessary is that the works should be done with as little damage or annoyance as can be—that is, as reasonably as can be. The words of sect. 12 of the *Waterworks Clauses Act* are, it will be observed, almost identical with the words of sect. 16 of the *Railway Clauses Act.*

This seems to me to be the principle accepted by the House of Lords in *Geddis* v. *Proprietors of the Bann Reservoir* (2). This also is the principle which seems to me to govern the decision of *Fremantle* v. *London and North-Western Railway Company* (3). The case of *Attorney-General* v. *Gaslight and Coke Company* (4), and the other gas company cases, depend, in my opinion, on the special words used in the *Gas Works Clauses Consolidation Act* (10 & 11 Vict. c. 15, s. 29), viz.: "Nothing in this or the special Act contained shall prevent the undertakers from being liable to an indictment for nuisance, or to any other legal proceeding to which they may be liable, in consequence of making or supplying gas." I find nothing of that kind in the *Waterworks Clauses Act*; because sect. 27 of that Act, which is the corresponding section to sect. 29 of the *Gas Clauses Act*, is limited to damage to mines. Judgment must be for the Defendants with costs, unless the Defendants consent to forego their costs.

The Defendants consented to the action being dismissed without costs.

Solicitors: *Wilkinson, Howlett, & Wilkinson; Bircham & Co.*

(1) Law Rep. 20 Eq. 544.
(2) 3 App. Cas. 430.
(3) 10 C. B. (N.S.) 89.
(4) 7 Ch. D. 217.

H. B. H.

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C. A.
March 2.

WHITWOOD CHEMICAL COMPANY *v.* HARDMAN.

[1891 W. 237.]

Contract of Service—Manufacturer's Manager—Agreement to give Whole Time—Absence of Negative Stipulation—Breach of Contract—Injunction—Specific Performance.

The manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business":—

Held (reversing the decision of *Kekewich, J.*), that (whatever other remedies the company might have), in the absence of any negative stipulation in that behalf, they were not entitled to an injunction to restrain the manager from giving, during the term, part of his time to a rival company.

Lumley v. *Wagner* (1) discussed.

Montague v. *Flockton* (2) disapproved.

APPEAL from Mr. Justice *Kekewich.*

By an agreement, dated the 25th of September, 1885, between the Plaintiffs and the Defendant, it was provided that the Defendant, a manufacturing chemist, should be the manager of the Plaintiffs' works at *Normanton* for five years, at a salary of £300 per annum, with a commission of 7½ per cent. on the dividends; and it was further provided that the Defendant should give due diligence to the performance of his duties, conduct himself with propriety, and conform to the reasonable requirements of the board of directors. The agreement contained no provision as to exclusive service or in restriction of the Defendant's employment at the end of the term.

By an agreement, dated the 24th of July, 1889, it was agreed that the Defendant should be manager for the remainder of an extended term of ten years from September, 1885, at the same salary and with the same commission. This agreement contained the following clause: "The said manager shall give the whole of his time to the company's business, he shall give due diligence to the performance of his duties, and shall conform to the reasonable requirements of the board of directors, and he shall reside

(1) 5 De G. & Sm. 485; 1 D. M. & G. 604. (2) Law Rep. 16 Eq. 189.

within two miles from the company's said works." The agreement contained no negative contract by the Defendant.

The Plaintiffs were incorporated in 1883 for the purpose of working a license, dated the 25th of September, 1885, from *Hardman's Patent Carbonization Process Company, Limited*, under letters patent for improvements in the carbonization of coal and coal shale, and in the treatment of coal gas for obtaining benzole, solvent naphtha and other products. *Hardman*, the patentee, was the Defendant's brother.

The license granted an exclusive right to work the patent within an area of ten miles from the company's works at *Normanton*.

One of the directors of the Plaintiff company stated in an affidavit that it had recently come to the knowledge of the company that the Defendant was in communication with a firm of colliery proprietors, whose colliery was distant about a mile from the company's works, with a view to setting up a rival establishment at or near the colliery for carbonizing coal, in which the Defendant was to invest a large sum as capital, and to be a director.

It was proved that the Defendant had written to one of the directors that it was practically impossible for him to work any longer with the company, and that for the benefit of both parties it would be advisable that the agreement should be cancelled, and that he was willing to leave at once, or at a month, or at the end of the half-year terminating on the 31st of March, 1891; and also that he had written to another of the directors that he had "decided to instruct a new company" about to be formed for carbonizing coal, and likewise to assume the position of a director, and take up one-third of the capital thereof.

It was alleged that the Defendant had had special opportunities of mastering all the details of the patent processes and their successful application, both in the service of the patentee himself, and in that of the Plaintiff company, and by the use of their property and resources.

The Defendant admitted that he had been actively engaged in forming a company to work the proposed new business, but stated that the Plaintiffs' process was widely known, and that he himself

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had gained his own skill, knowledge, and experience while with his brother, the patentee; and that he had learned nothing whatever whilst with the Plaintiffs regarding the patent, and the working thereof, which he did not know before.

The Plaintiffs brought this action, and claimed an injunction to restrain the Defendant from setting up any business, or entering into any agreement, or making any engagement with any person or company other than the Plaintiffs, by which the whole of the Defendant's time would cease to be devoted to the business of the Plaintiffs, or by which the Defendant would be prevented from carrying out the agreement of the 24th of July, 1889, and in particular from assisting in the formation of, and from becoming a director, manager, or agent of any company or partnership then or thereafter to be formed for the purpose of carrying on a similar business and manufacture to those carried on by the Plaintiffs during the residue of the term specified in the agreement. The Plaintiffs then moved for an injunction in the terms of their claim until the hearing of the action or further order. The motion was heard before Mr. Justice *Kekewich* on the 6th of February, 1891.

Warmington, Q.C., and *Dibdin*, for the Plaintiffs, contended that the Defendant would, by assisting in carrying on the business of the new company, be committing a direct breach of his covenant to devote the whole of his time to the business of the Plaintiffs. They referred to *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (1), *Lumley* v. *Wagner* (2), *Montague* v. *Flockton* (3), and *Fechter* v. *Montgomery* (4).

Marten, Q.C., and *Archibald Brown*, for the Defendant, contended that an ordinary contract for personal service such as that in the present case could not be enforced. Cases such as *Lumley* v. *Wagner* were cases of special contract and special service. They also referred to *Johnson* v. *Shrewsbury and Birmingham Railway Company* (5). They offered, on behalf of

(1) Law Rep. 16 Eq. 433.
(2) 1 D. M. & G. 604.
(3) Law Rep. 16 Eq. 189.
(4) 33 Beav. 22.
(5) 3 D. M. & G. 914, 926, 927.

the Defendant, to resign his appointment as the Plaintiffs' manager.

Warmington, in reply.

KEKEWICH, J.:—

Under these two agreements of the 25th of September, 1885, and the 24th of July, 1889, read together, the Defendant is engaged and bound to serve the Plaintiffs for a period of ten years at a salary of £300 and a commission of 7½ per cent. on the profits; and he is bound during the term of his employment to give the whole of his time to the company's business.

On these two agreements, and the facts as proved by the affidavits, two questions have been raised. First, it is said on behalf of the Defendant that he is now entirely free from that engagement; that he may, if he pleases, quit the company's employment, and that, if he does, he will not be liable to an action for damages; that he is only continuing the employment for the convenience of the company, and not because he in any way desires to do so. That may turn out to be a question of some difficulty; but I am unwilling, and I think it is unnecessary, to decide it finally now, because I do not think I have before me all the materials which would be required for a final decision; and I am not prepared to say that a master may not so behave to a servant—or, to prevent misunderstanding, an employer to an *employé*—in such a way as to justify the *employé* in breaking his engagement. The employer may refuse to admit him into his works; he may decline to allow him to work when he goes there; he may treat him with an entire want of confidence; he may use such language to him as to make it impossible, as Mr. *Marten* said, for a man with any proper self-respect to stay there. And there may be extreme cases in which the *employé* would be entitled to say to his employer, "You have yourself broken the contract, and you cannot sue me." That there may be many cases in which a jury would give merely nominal damages cannot, I think, be doubted. But I will go further. I think there may be cases in which the Court would hold that the action would not lie—that there was no question

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of fact to be submitted to the jury. But I am not satisfied that anything of that kind appears here. I think, if the Defendant is hereafter advised to raise that question, that must be raised in a proper way on a full investigation of the facts. I do not think the affidavits here, standing alone, disclose such a case; and, without going further, I think I should be wrong in saying that the Defendant is entitled to defeat the motion on the ground that he is either no longer the servant of the company, or is in such a position that he may determine his service to-morrow, in which case, of course, an injunction would be useless, because he has only to give the whole of his time to the company's business while he remains as manager.

The other argument is that there ought not to be any injunction to restrain the Defendant, even though he may be doing something which contravenes the covenant into which he has entered. It is common knowledge that a covenant of this kind is not enforceable, in the sense that specific performance cannot be decreed; and that proceeds, not only on cases and on law, but on common sense. It would be quite impossible to make a man work, and therefore the Court never attempts to do it. But a covenant is enforceable in another sense, namely, that so long as it has not been determined and is not immediately determinable, it can be made the ground of an action for damages; and it is therefore binding upon the party, and can be enforced in that way. And the Court of Chancery has, over and over again, in a large variety of cases, enforced a contract where it has found an exclusive term—that is to say, where the *employé* has bound himself not to do that which is inconsistent with the terms of his engagement. There are the common cases of the ordinary trade-servant, such as the milkman who engages, either during his period of service or for a certain number of years afterwards, not to engage with anyone else within a particular limited radius. There are also cases, of which *Lumley* v. *Wagner* (1) is a well-known example, where the *employé* is an artist, having special knowledge, special powers, or special abilities, which he or she has engaged to give up and use for the benefit of the employer. That is the foundation of such cases as *Lumley* v. *Wagner*. It is because the

(1) 1 D. M. & G. 604.

defendant in a case of that kind is an artist who cannot easily be replaced that such an action is brought. And that is easily illustrated by what Lord Justice *Knight Bruce* said in the case of *Johnson* v. *Shrewsbury and Birmingham Railway Company* (1), where he states (2) the impossibility of enforcing contracts between a man and his valet, or coachman or cook, who, however excellent they may be in their particular capacities, can be replaced; and on the very next page of the report the Lord Justice expresses his satisfaction that *Lumley* v. *Wagner* (3) was decided in the way in which it was. He does not draw the distinction in so many words between the domestic servant on the one hand and the German singer on the other; but the way in which he places them in contradistinction shews, I think, very clearly what was passing in his mind.

Now, here I have a man whom, from his own statements and the other affidavits before me, I must take to be a man who has special knowledge of this special business; and if he has contracted in effect not to give time to others, but to give his time and his powers to this particular company, the case seems to me to be quite as much within the authority of the case of *Lumley* v. *Wagner* as that of any singer or other artist.

Has he contracted to do this? He has contracted to give, during the period of time which I have mentioned, the whole of his time to the company's business. The negative seems to me not to be implied but to be expressed; though the covenant is in the positive and not in the negative form, still it is no less negative because it is in that positive form; and I think I should be doing injustice to the ordinary construction of the English language if I failed to see in that covenant on his part anything but a covenant that he will not give his powers and his strength of body and mind to another business. And I have no doubt at all from the affidavits that that is what he is threatening and intending to do.

There are passages which have been read to me from the affidavits, and which I have noticed, in which he speaks about employment of his time out of office hours, or his "free time."

(1) 3 D. M. & G. 914. (2) 3 D. M. & G. 926.
(3) 1 D. M. & G. 604.

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But he fails to tell me how he is going to do this which he distinctly says he wishes and intends to do, except during the time which certainly may be, if not must be, required for his services to the company. In his letter to one of the directors of the Plaintiff company, he says he is going to "instruct a new company" whose objects would be similar to those of the Plaintiff company. He says he is going to be a director of that new company, and that he is going to take up a large part of the capital; and the obvious meaning of that statement standing alone, is that he intends to give a considerable portion of his time to that new company. And throughout the letter, except in particular passages which are relied upon as shewing a different intention, he shews from his own statements, that he does so intend, and that he must, if he fulfils his intentions, devote some considerable time to this new company. I certainly do not intend to decide that this gentleman may not, out of his office hours or in his free time, do anything which it pleases him to do which does not interfere with the performance of his duties to the Plaintiff company. I am not by any means saying that he can, even out of office hours and in his free time, assist a rival company in its rivalry; but that question at present does not arise. He may do much that may be useful to him; he may earn money in other ways in his free time; but what is his free time I cannot, with the materials at present before me, undertake to determine. I think I may, without presuming to know more than a judge may of the world, conclude that occasionally at least, if not frequently in businesses of this character, the day is a long one—far longer than the limited period to which some people usually restrict their work; and I can hardly conceive it as possible that, if these two companies were working side by side, the demands on the manager for his time would not frequently, probably daily, overlap.

I respond to Mr. *Warmington's* invitation in mercy to the Defendant to say distinctly whether I think what he threatens and intends to do will be a breach of the injunction which I propose to grant in general terms. I think that if he engages as manager, or in any respect as a responsible servant, of this new company, still more if he is, as a director, undertaking duties which I shall

assume of course he would perform in connection with it, and takes an active part in the management, he will be devoting to that company time which he has by his covenant agreed to devote to the business of the Plaintiff company. I think, therefore, that I must restrain him from doing that which he has contracted not to do. And in granting the injunction I think I shall not be going beyond many cases which have been decided from time to time, including *Lumley* v. *Wagner* (1); and I have been referred to one well-known case of *Montague* v. *Flockton* (2), where an actor was restrained—and an actor is also an artist, a man with special powers, special abilities—as coming within the principle which I have mentioned. I think I ought to express the injunction in general terms. I do not think I can grant it in the terms asked in the notice of motion, because they are too wide. I do not think I could, either with justice to the Plaintiffs or in mercy to the Defendant, express it so definitely as to make it clear hereafter what will be and what will not be within the order; and therefore, on the whole, I think it better to follow the usual course of limiting the injunction to the exact words of the contract, so far as they can be made applicable to it. But I think I have said enough to shew what, in my opinion, will bring the Defendant within the terms of that injunction—how far he may, and how far he may not, do other business than that of the Plaintiff company, and yet not be liable to committal.

I think the injunction should be to restrain him from giving less than the whole of his time to the company's business.

G. I. F. C.

C. A.

From this decision the Defendant appealed.

The appeal was heard on the 2nd of March, 1891.

Marten, Q.C., and *Archibald Brown*, for the Appellant:—

1. The Appellant has the right to resign his post as manager and has offered to do so.

2. This is an attempt to enforce specific performance of a contract for personal service, and it has long been settled that the

(1) 1 D. M. & G. 604. (2) Law Rep. 16 Eq. 189.

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Court will not decree specific performance of such a contract; and will not interfere by injunction where it cannot decree specific performance: *Lumley* v. *Wagner* (1); *Johnson* v. *Shrewsbury and Birmingham Railway Company* (2); *De Francesco* v. *Barnum* (3); *Fothergill* v. *Rowland* (4).

[KAY, L.J., referred to *De Mattos* v. *Gibson* (5).]

The absence of any negative contract by the Defendant not to do anything inconsistent with his agreement is fatal to the Plaintiffs' claim: *Lumley* v. *Wagner*; *Donnell* v. *Bennett* (6).

The decision of *Malins*, V.-C., in *Montague* v. *Flockton* (7), may be cited by the other side, but that decision proceeds, we submit, upon a misapprehension of the effect of the judgment of Lord *St. Leonards* in *Lumley* v. *Wagner*.

[LINDLEY, L.J., referred to *Radford* v. *Campbell* (8).]

Warmington, Q.C., and *Dibdin*, for the Plaintiffs:—

The Defendant cannot without our consent release himself from his obligations to us. He has covenanted to be our manager for a term of years, and during that period to "give the whole of his time" to the Plaintiffs' business. The "whole" must be each part, and the positive covenant to give "the whole time" in a particular way, is exclusive in its character, and implies a negative covenant not to give any part of that time to an object or in a manner inconsistent with the due performance of the positive covenant. Yet he is endeavouring to set up within the district a rival company to work the very same patent the Plaintiffs are working, and he does devote part of the whole of his time to the business of that rival company. That is a breach of his covenant which we are entitled to restrain by injunction: *Webster* v. *Dillon* (9); *Lumley* v. *Wagner*; *Montague* v. *Flockton*; *Doherty* v. *Allman* (10); *Pemberton* on Judgments (11).

(1) 5 De G. & Sm. 485; 1 D. M. & G. 604.
(2) 3 D. M. & G. 914.
(3) 43 Ch. D. 165; 45 Ch. D. 430.
(4) Law Rep. 17 Eq. 132.
(5) 4 De G. & J. 276.
(6) 22 Ch. D. 835.
(7) Law Rep. 16 Eq. 189.
(8) 6 Times L. R. 488.
(9) 3 Jur. (N.S.) 432.
(10) 3 App. Cas. 709.
(11) 4th Ed. pp. 461, 462.

The Defendant has, moreover, acquired a special knowledge of the Plaintiffs' trade process and secrets, and while he is our manager he is in a fiduciary position towards us, and it is a case of "petty treason" for him to start a new company. He is, in fact, in the position of a partner after the expiration of the partnership: *Dean* v. *MacDowell* (1).

LINDLEY, L.J. (without calling for a reply, stated the facts of the case, and continued):—

The object of the Plaintiffs in this action is to obtain an injunction to restrain the Defendant from doing that which he either is doing, or, according to the Plaintiffs, is about to do. It is alleged against him that, in violation of the agreement that he should give the whole of his time to this company, he is either giving some of his time, or about to give some of his time, to a rival company; and the Plaintiffs, very naturally, desire to stop that course of action on his part. They are not disposed to let him go before the end of the ten years; and they take the view that, without their consent, he is not at liberty to release himself from the obligations into which he has entered by the agreement, and, to that extent, they appear to me to be right enough. If he is committing a breach of the agreement, he is doing that which is wrong in point of law; but that is not the question. The question is as to the Plaintiffs' remedy. Now there are various remedies. There is the remedy of dismissal, there is the remedy of an action at law, and there is the remedy by injunction. The Plaintiffs are not disposed to avail themselves of the first two remedies. They do not want to dismiss the Defendant, and they do not want to bring an action against him—they want an injunction. They asked the Court below for an injunction in terms which are different from those in which the learned judge has granted it. Their motion was that the Defendant might be restrained from setting up in business, or entering into any agreement or engagement with any person or company other than themselves, by which the whole of the Defendant's time would cease to be devoted to their business, or by which the Defendant would be prevented from carrying out his agreement

(1) 8 Ch. D. 345, 348.

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with them. The question is, whether an injunction in those terms, or substantially in those terms, ought to be granted, having regard to the principles upon which the Court acts in cases of this description. The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the Plaintiffs are suing—that is to say, the parties have not expressly stipulated that the Defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the Defendant has agreed to give "the whole of his time" to the Plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in *Lumley* v. *Wagner* (1), and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. In this case, we are left more or less in the dark about that, because, as I have said, there is nothing that shews that anything definite was in the minds of these parties beyond this, that the Defendant was to give the whole of his time to the Plaintiffs' business.

Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum*; but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of a personal service, and, as a rule, the Court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained

(1) 1 D. M. & G. 604.

more or less definitely in *Lumley* v. *Wagner* (1)—that is to say, where a person has engaged not to serve any other master, or not to perform at any other place, the Court can lay hold of that, and restrain him from so doing; and there are observations, in which I concur, made by Lord *Selborne* in the *Wolverhampton and Walsall Railway Company* v. *London and North Western Railway Company* (2), to the effect that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other—some specific thing upon which you can put your finger.

But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the Plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond *Lumley* v. *Wagner*, and every case except *Montague* v. *Flockton* (3). The principle is that the Court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is. Reliance was placed on *Montague* v. *Flockton*, in which also there was no negative clause. I pass by the prior case, before *Wood*, V.-C., *Webster* v. *Dillon* (4), because it was not argued, and the defendant did not appear; but in *Montague* v. *Flockton*, *Malins*, V.-C., did go to the length of restraining an actor from performing at a rival theatre, although there was no stipulation on his part, in terms, that he would not do so; and, with great deference to the learned Judge, I must say I think he arrived at that conclusion owing to a misunderstanding of *Lumley* v. *Wagner*. I cannot read the decision of *Malins*, V.-C., without seeing that he was under the impression that Lord *St. Leonards* in *Lumley* v. *Wagner* would have granted the injunction, even if

(1) 1 D. M. & G. 604.
(2) Law Rep. 16 Eq. 433.
(3) Law Rep. 16 Eq. 189.
(4) 3 Jur. (N.S.) 432.

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the negative clause had not been in the contract. This was a mistake. Lord *St. Leonards* was very clear and explicit on that subject. He said distinctly he would not have done it in the absence of that negative clause, but he did go on to say in other parts of his judgment that in the absence of that negative clause there would have been a breach of the agreement. That is true enough, and *Malins*, V.-C., I think, was under the impression that Lord *St. Leonards* intended to intimate not only that there would be a breach of the agreement, but that the remedy of injunction would be granted in the absence of that negative clause, which is not in accordance with the judgment in *Lumley* v. *Wagner* (1), as I understand it. Apart from *Montague* v. *Flockton* (2), there is no case which warrants the injunction which the learned judge in this case has made, and we must therefore fall back and see if we can find any principle upon which he has acted. Now, unquestionably, if the principle were that the Court would decree specific performance of all contracts, that would carry it; but the principle being the other way as regards contracts of service, it lies upon the Plaintiffs to shew that there is some recognized exception in this particular case, and that they fail to do.

I agree with what the late Master of the Rolls, Sir *G. Jessel*, said about there being no very definite line. I agree, also, in what Lord Justice *Fry* has said more than once, that cases of this kind are not to be extended. I confess I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason, that I think the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the Court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction. I am assuming that the

(1) 1 D. M. & G. 604. (2) Law Rep. 16 Eq. 189.

Defendant either has broken his agreement, or intends to do so if he can. I assume that he is wrong, but I say, assuming that, the remedy is not that which the Plaintiffs claim, *i.e.*, by injunction, but by damages, when the agreement is broken.

KAY, L.J.:—

I think, with great deference to the learned Judge of the Court below, that he has been rather carried away by his desire to do justice, and to prevent what he seems to have regarded as a wrong contemplated by the Defendant in this case, and he has not given quite sufficient consideration to the difficulty which this Court always feels when it is asked to interfere by injunction in order to perform part of a contract, the whole of which it could not perform if the suit had been for specific performance.

The facts have been very explicitly stated by Lord Justice *Lindley*, and I will not repeat them.

The truth is that this contract contained no negative term whatever, it contained only a term that the Defendant should while he was manager for the Plaintiffs, for a certain period of ten years, give them the whole of his time—I am not giving the very words, but that is the substance of it. Now what the Plaintiffs are seeking to do is, not really to obtain specific performance of that term, they do not want to prevent, by any order of this Court, his employing part of his time for some other purpose, but they apprehend that he is about to employ part of that time which should be occupied by him in the management of their business in founding a company to carry on a rival business, and acting as a director of that company, and they want the injunction, not because he is taking away part of his time from their service, but because they apprehend that the time which he is so taking away is going to be employed in carrying on a rival business to their detriment.

That is quite plain if we look to the writ in this action. [His Lordship referred to the writ, and continued:—] Therefore what they have tried to do is this, to prevent his setting up a rival business, by obtaining the assistance of the Court for specific performance of that part of the agreement which expresses that he shall give the whole of his time to their business. There

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are two answers to the case they make, one is this—that the Defendant never has contracted in any way that he will not set up a rival business. He has not contracted that he will not become a director of a rival company, nor that he will not form a rival company, and if he does it out of business hours, it is, as, I understand, admitted that no injunction ought to be granted against him.

Now, first of all, let me consider whether the Court has ever gone so far as to grant such an injunction as the learned Judge has granted in this case. I am aware of no case in which it has done anything of the kind. The nearest are the cases of *Montague* v. *Flockton* (1), and *Webster* v. *Dillon* (2). Of these, *Webster* v. *Dillon* was a case which was not argued, it was an *ex parte* injunction, for the defendant was not represented at all; and it seems to have passed without any argument or discussion of the authorities whatever. In *Montague* v. *Flockton*, *Malins*, V.-C., gave a considered judgment, and he certainly did, although there was no negative clause in the agreement, restrain an actor who had contracted to act for the plaintiff from acting for another person during the term for which he had contracted so to act for the plaintiff. But it is quite plain to my mind that the whole judgment proceeded upon some misapprehension of the decision of Lord *St. Leonards* in the well-known case of *Lumley* v. *Wagner* (3), because *Malins*, V.-C., says this (4): "I certainly am under the impression that in the case of *Lumley* v. *Wagner*, if there had been no negative stipulation the Court would have interfered; and I gather this particularly from the passage in Lord *St. Leonards* judgment where he says, 'the agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though, beyond all doubt, this Court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another

(1) Law Rep. 16 Eq. 189.
(2) 3 Jur. (N.S.) 432.
(3) 1 D. M. & G. 604.
(4) Law Rep. 16 Eq. 198.

theatre.'" And something more may be added to the same effect from the judgment in *Lumley* v. *Wagner* (1), for Lord *St. Leonards* is reported to have said (2): "I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered." But the Vice-Chancellor omitted to observe that further on Lord *St. Leonards*, after considering the cases of *Clarke* v. *Price* (3) and *Morris* v. *Colman* (4), says expressly: "I may at once declare, that if I had only to deal with the affirmative covenant of the Defendant *J. Wagner* that she would perform at *Her Majesty's Theatre*, I should not have granted any injunction." That case, certainly at the time it was decided, was understood to have carried the power of the Court of Chancery in granting injunctions to the extreme limit to which it could go. The contract there was one which the Court could not specifically perform. It could not compel Miss *Wagner* to sing. Lord *St. Leonards* distinctly disclaims any power in the Court of Equity to do anything of the kind. He makes it clear that he granted the injunction upon the express agreement on her part that she would not during a certain time sing for anybody else, and that if those negative words had not been there, he could not have granted the injunction. He says so in so many words. I quite agree that there have been cases—they are very few and *De Mattos* v. *Gibson* (5) is perhaps the most striking of them—in which there have been injunctions granted although there were no negative words. The decision in *De Mattos* v. *Gibson* was, as stated in the headnote to the report, "The Court will not affirmatively enforce a charterparty, but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; and a mortgagee, with notice of a prior charterparty effected with the mortgagor, will be in general restrained from doing anything to prevent its performance." There was a charterparty with the absence of any

(1) 1 D. M. & G. 604.
(2) Ibid. 618, 622.
(3) 2 Wils. C. C. 157.
(4) 18 Ves. 437.
(5) 4 De G. & J. 276.

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negative covenant, and the Court, although it felt the difficulty of granting specific performance of the charterparty, did go so far as to say that an injunction could be granted to prevent the use of the ship, during the time which was covered by the charterparty, for other purposes. It is possible that there may be other cases, but those cases are very rare. They are certainly to be followed with extreme caution, and I do not know, with the exception of the two cases of *Webster* v. *Dillon* (1), and *Montague* v. *Flockton* (2), of any case whatever in which that very extraordinary jurisdiction of granting a partial specific performance by way of injunction, where the Court could not enforce the whole of the contract, has ever been exercised in the case of hired servants.

However, what strikes me in this case is that if the Court could possibly interfere in the way in which the learned Judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the Court could possibly have granted such an injunction. The Court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bonâ fide*, for that purpose, but it is wanted to prevent

(1) 3 Jur. (N.S.) 432. (2) Law Rep. 16 Eq. 189.

him from setting up a rival business which he has not contracted not to do.

I therefore think that this decision must be reversed, and the appeal allowed.

Solicitors for Plaintiffs: *Vincent & Vincent*, agents for *North & Sons, Leeds.*

Solicitors for Defendant: *West, King, Adams, & Co.*, agents for *Moxon, Pontefract.*

W. W. K.

In re PORRETT.

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Feb. 20.
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April 7.

Practice—Liverpool and Manchester District Registries—District Registrar—Jurisdiction—Solicitor and Client—Bill of Costs—Petition of Course—Taxation—Rules of Supreme Court, 1883, *Order* XXXV., *rr.* 6, 6*a*, *sub-r.* 2; *Order* LXII., *r.* 18—*Regulations of District Registry.*

A Registrar of the District Registry of *Liverpool* or *Manchester* has no jurisdiction to make a common order for taxation of a solicitor's bill of costs on an originating petition of course.

The decision of *Kekewich*, J., reversed.

ON the 9th of February, 1891, a petition of course, intituled in the above matter, and marked "In the High Court of Justice, Chancery Division, *Liverpool* District Registry, Mr. Justice *Kekewich*," was presented to the *Liverpool* District Registry by the *Animal Products Company, Limited*, a company having its registered office in *Liverpool*, and carrying on business there, alleging that they had employed Mr. *David Hunton Porrett*, of *Sheffield*, as their solicitor, to collect certain sums due to them, and that the amounts received by him were greatly in excess of the sum due to him from them for costs; and that he had failed to deliver his bill, notwithstanding repeated applications by them to do so: and the petition accordingly asked that Mr. *Porrett* might be ordered to deliver his bill of costs in respect of the business done by him, and that such bill might be taxed by one of the District Registrars. On the same day the *Liverpool* District Registrar made an order for delivery and taxation

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of the bill. The order, having been drawn up, passed, and entered by the District Registrar, was served upon Mr. *Porrett* on the following day, the 10th of February.

Mr. *Porrett* now moved, on notice to the company, that the order might be discharged, upon the grounds that the District Registrar had no jurisdiction to hear the petition, or any petition of course, and that any order made on such a petition ought to be drawn up, passed, and entered by or under the direction of the Registrars of the Chancery Division of the High Court; and that, even if the District Registrar had jurisdiction to entertain the petition, he ought to have referred it to his Lordship, Mr. Justice *Kekewich*, to make the order, if any, thereon; and that the said order was, for those reasons, irregular: and the applicant further moved that, if the Court did not think fit to discharge the order, the matter might be removed from the district registry to *London*, no part of the business to which the petition and order related having been done within that district registry, and the said *David Hunton Porrett* neither residing in nor carrying on business within that district.

The motion was supported by an affidavit by Mr. *Porrett*, in which he stated that he did not reside within the *Liverpool* District Registry, nor had ever done so, nor had he ever been employed in any business for the company within that district; and that the only business in which he had been employed by them had been done, as to the greater portion of it, in the *London* Bankruptcy Court, and as to the rest, in the *Sheffield* County Court: and he submitted that the order of the District Registrar was irregular and ought to be discharged; but in any event he desired that his costs, if taxed, should be taxed in *London* before one of the Taxing Masters there. He further stated that it would be a great inconvenience and hardship to him if the taxation of his costs were to take place in *Liverpool*, where he had no regular agent: that he should either have to incur the expense and loss of time of taking a special journey to *Liverpool*, a distance of about seventy-two miles, to attend such taxation personally, or he should have to instruct agents there, who knew nothing of any part of the business in which he had acted for the company, to attend such taxation on his behalf;

and he stated his belief that such taxation could not be satisfactorily conducted without the attendance thereat of a representative from the office of his *London* agents, inasmuch as the greater portion of the business, namely, that in the *London* Bankruptcy Court, had been actually done by them.

The motion was heard before Mr. Justice *Kekewich* on the 20th of February, 1891.

Bardswell, for the motion:—

I submit, first, that the District Registrar had no power to entertain a petition of course; and, secondly, that, if he had, the matter should have been referred to your Lordship personally to make the order.

The 60th and following sections of the *Judicature Act*, 1873, dealing with district registries, do not give a District Registrar the jurisdiction now claimed, and it is necessary, therefore, to turn to the general orders, rules and directions to see what are the powers of a District Registrar. By the Rules of Supreme Court, Order XXXV., rule 6, where a matter is proceeding in a district registry, "the District Registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a Judge at Chambers," except such as a Master or Chief Clerk is precluded from exercising. Then rule 6*a* provides that, "Where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of *Liverpool*, or in the district registry of *Manchester*, the District Registrar shall act in respect thereof, and throughout all the proceedings therein, as a Chief Clerk of the Judge of the Chancery Division to whom the cause or matter is assigned, and as Registrar and Taxing Master, according to directions to be given from time to time by such Judge." That rule draws a distinction between his duties as "Chief Clerk" and his duties as "Registrar." Then there is an interpolated rule, sub-rule 2, made in 1887, providing that "Petitions presented in the district registries of *Liverpool* and *Manchester* respectively, and requiring answer, shall be answered in the name of one of the District Registrars of the same respective registries; and the Rules of the Supreme Court, and in particular Order LXII., rule 18,

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shall, as regards such petitions, be construed as if the District Registrars of *Liverpool* and *Manchester* respectively were mentioned in place of the Registrars of the Chancery Division." Then Order LXII., rule 18, says, that "All petitions which require to be answered shall be answered in the name of the Senior Registrar for the time being, and any orders on petitions which, according to the practice formerly prevailing in the Chancery Division, were drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls, shall be drawn up, passed, and entered by or under the direction of the Registrars of the Chancery Division." Reading that rule and sub-rule 2 of rule 6*a* of Order XXXV. together, the District Registrar of *Liverpool* or *Manchester* should be read for "Senior Registrar," and the only petitions dealt with are "petitions which require to be answered," and "such petitions," when presented in the district registry, may be answered in the name of the District Registrar; thus, orders of course made upon petitions presented in the district registry are left untouched by those rules, and, therefore, they must continue as before to be drawn up, passed, and entered by the Registrars of the Chancery Division. And further, the directions issued to the District Registrars by your Lordship shew that the rules only contemplate petitions which require to be answered, for, under the head of "Delivery and Taxation of Bills of Costs" (Annual Practice, 1890–1 (1)), the directions are: "On an application against a solicitor for delivery and taxation of a bill of costs and delivery up of deeds, the District Registrar shall hear the application, complete the evidence, and then refer it to the Judge." Those directions are obviously applicable only to petitions which require to be answered and upon which evidence is therefore necessary.

Moreover, upon the ground of convenience, the taxation should take place in *London*, where both parties have agents. In the case of the applicant, he has no agent in *Liverpool*, and the distance of *Sheffield* from *Liverpool* would occasion him great inconvenience; whereas, in *London*, his agents there, having themselves conducted the greater part of the business in which

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the costs were incurred, can conveniently attend the taxation proceedings.

Warmington, Q.C., and *P. O. Lawrence*, for the Petitioners, were not called upon.

KEKEWICH, J.:—

I cannot disturb this order.

The first point depends upon the alteration made by Order XXXV., rule 6*a*, sub-rule 2, to which I will presently refer, in Order LXII., rule 18. The order here made was made upon a petition of course—that is to say, a petition which required no answering, and which required no service; that is, it had no respondent in the sense in which an order is made upon a petition on which a respondent appears, and the order was in fact made without the attendance of any respondent.

These orders were formerly made on petition of course at the Rolls. They have now been transferred to the office of the Registrars of the Chancery Division, and the second branch of rule 18 of Order LXII. deals with that point, the first branch dealing only with petitions which require to be answered. The second branch of the rule says that "any orders on petitions which, according to the practice formerly prevailing in the Chancery Division, were drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls, shall be drawn up, passed, and entered by or under the direction of the Registrars of the Chancery Division." Therefore an order made on such a petition is a Registrar's order, and is not one of the orders that can be made by a Chief Clerk. An alteration has, however, been made with regard to petitions in proceedings in the *Liverpool* and *Manchester* District Registries; and the district registrar has been substituted for the Registrars of the Chancery Division: so that such petitions, when presented in the *Liverpool* and *Manchester* District Registries, may be answered at once instead of being sent up to *London* to be answered and thence transmitted and served.

But Order XXXV., rule 6*a*, sub-rule 2, does not deal in any way with orders on petitions not requiring to be answered—that is to

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say, the petitions dealt with by the second branch of rule 18 of Order LXII.; the rule says that "where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of *Liverpool* or in the district registry of *Manchester*, the District Registrar shall act in respect thereof, and throughout all the proceedings therein, as a Chief Clerk of the Judge of the Chancery Division to whom the cause or matter is assigned." I need not discuss whether under that rule the District Registrar could have made an order in the same way as a Chief Clerk, because the rule goes on to say that he is to act, not only as Chief Clerk, but also as Registrar and Taxing Master, "according to directions to be given from time to time by such Judge."

Therefore it is clear that when once you have a cause or matter commenced in the *Liverpool* District Registry, thereupon the District Registrar becomes empowered to act as a Registrar of the Chancery Division, and comes distinctly within the second branch of rule 18 of Order LXII., and can make an order which formerly was made by the secretaries of the Master of the Rolls. But Mr. *Bardswell* pointed out that, however that might be, it is not usual for the District Registrar to make such an order as this, and that he ought not to have made it, and that in that sense the order is irregular. The directions given by me to the District Registrars, though they have not the force of rules, are intended to lay down what is and what is not within their cognizance; and I am glad to find that they are known to the profession, for it is convenient for it to be informed as to what my officers have directions to do. One of these directions, as stated in the Annual Practice, 1890–91 (1), is this: "Delivery and Taxation of Bills of Costs.—On an application against a solicitor for delivery and taxation of a bill of costs and delivery up of deeds, the District Registrar shall hear the application, complete the evidence, and then refer it to the Judge." Upon that it is said that the District Registrar ought not to have made this order. Whether I had petitions of course in my mind when I drew up that direction, I cannot say; but the language of it is distinctly against Mr. *Bardswell's* contention. In the first place, the Registrar is to "complete the evidence." Now, upon a

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petition of course there is no evidence, and therefore the words "complete the evidence" cannot have any connection with a petition of course. Then, again, the words "delivery and taxation of a bill of costs" are mentioned, and connected by the copulative "and," with the words "delivery up of deeds," which latter words are inconsistent with a petition of course. Then the Registrar is directed to hear the application; but there is no hearing of a petition of course. All that the District Registrar can do under that direction is to see that the application is in proper form and that the order goes in a proper form.

The whole language, in my opinion, points to something in which there is not only a discretionary power to be exercised, but in which there is a matter in contest and there is evidence on both sides. I cannot think that can prevent the District Registrar from making an order on a petition of course when the Judge can do nothing himself but say "common order"; and that the Registrar must send the petition up to *London*, and so cause useless expense. Accordingly it appears to me, on all these grounds, that this motion fails upon the question of irregularity, and must be refused.

The other point raised is that this taxation ought to have been removed to *London*. I am always averse to referring to my own language in other cases, except where by so doing I can avoid saying the same thing over again, and it is only for that reason that I refer to the case of *Re Neath and Bristol Steamship Company* which is mentioned in the Annual Practice (1), and where I endeavoured to lay down the rule that there are two classes of cases in which the power of transfer of causes or matters pending in the *Liverpool* or *Manchester* District Registries should be exercised: first, when the Court considers that parties have improperly commenced proceedings in such registries in order, under the altered practice, to advance their litigation; and secondly, when the balance of convenience is in favour of transferring the case to *London*. Now with regard to the first of those two classes of cases, I have here a petition for taxation by a company whose domicil, or at any rate its place of business, is in *Liverpool*. There is no reason to suppose, and it is not

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suggested, that the petition was presented to the *Liverpool* District Registry in order to obtain any unfair advantage. It is true that the company's debtor, or rather the gentleman whose bill of costs they require to see, lives in *Sheffield*. It may be said that they might have sued him, and that in the ordinary course they would sue him, in *Sheffield*; but on the other hand this is not an ordinary case of suing a person for debt. Without any special circumstances to convince me to the contrary, I do not think that this case comes within the first class of cases to which I have referred.

Upon the question whether it falls within the other class of cases, there is a little more difficulty. It is said that it would be more convenient if the taxation were to take place in *London*. A solicitor living in *Sheffield* might or might not go to *London* more easily than to *Liverpool*. Mr. *Porrett* has agents in *London*, as all country solicitors have. I gather, however, that he would attend the taxation himself, and that he would not employ his *London* agents except as a matter of form. Therefore I do not think there is very much in the *London* agency argument. I am not convinced that it is more difficult to get from *Sheffield* to *London* than from *Sheffield* to *Liverpool*. On the other hand, the company's books are in *Liverpool*, and are, I suppose, constantly required for the purposes of their business: consequently it would not be of much convenience to them to have the taxation proceeded with in *London*. Therefore I do not think I ought to disturb this order on the ground of the balance of convenience.

I therefore refuse this motion, with costs; and Mr. *Porrett* must deliver his bill on or before the 3rd of March.

G. I. F. C.

C. A.

From this decision Mr. *Porrett* appealed. The appeal was heard on the 7th of April, 1891.

Sir *H. Davey*, Q.C., and *Bardswell*, for the Appellant:—

We appeal on two grounds, first that the District Registrar had no jurisdiction to make the order for taxation; and secondly, that it would be most convenient that the bill of costs should be taxed in *London*.

The only rules under which the Respondent can allege that jurisdiction is given to the District Registrar are Order LXII., rule 18, and Order XXXV., rule 6, which applies that rule to district registries, and the sub-rule 2 of May, 1887; but those rules only apply to "causes or matters proceeding" in a district registry, not to an originating petition like the present; and the additional sub-rule of May, 1887, only refers to petitions requiring an answer, which this petition does not require.

[They were stopped by the Court.]

Warmington, Q.C., and *Durandu*, for the Petitioners:—

The district registries were established by the *Judicature Act*, 1873, sect. 60 and the following sections; but the District Registries of *Liverpool* and *Manchester* are placed on a different footing from the other District Registries, and are in fact made a branch of the High Court of Justice; and by Order XXXV., rule 6*a*, the Registrars have the same power as the Chief Clerks, and as Registrars and Taxing Masters of the Chancery Division, according to directions to be given by the Judge. Rules as to the practice have been issued by Mr. Justice *Kekewich*, to whom the causes and matters in those District Registries have been assigned by the Lord Chancellor, and he has directed all petitions against solicitors for taxation of bills of costs in which evidence is required, to be brought before him. But this does not interfere with the power of the Registrar to make such an order as might be made on a petition of course by the Registrars of the Chancery Division under Order LXII., rule 18. It is said that Order XXXV., rule 6*a*, only applies to petitions made in causes or matters proceeding in the District Registry, but when the petition has been presented the matter is proceeding within the meaning of the rule. The sub-rule 2 of May, 1887, does not in terms refer to petitions of course which do not require an answer; but the second clause of the sub-rule appears to apply to all petitions presented to the two District Registrars.

Sir *H. Davey*, in reply:—

The Registrars can have no jurisdiction except what is expressly given them by the statute, or by the rules having the

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force of a statute. The Respondent has failed to shew that any such jurisdiction has been given. It would be a very oppressive power if it existed, and the Court will not strain the construction of the rules to create it. All the rules of Order xxxv., from 1 to 6*a*, expressly refers to causes or matters actually proceeding in the District Registries, and to them only. An originating petition can in no sense be included in those words.

LINDLEY, L.J.:—

This appeal is of some considerable importance to solicitors, to say the least of it. In form, it is an appeal from an order made by a District Registrar of the *Liverpool* district, and it is an order made upon a petition of course; it directs a solicitor, Mr. *Porrett*, to deliver his bill of costs; then it orders that that bill be referred to one of the District Registrars at *Liverpool* to be taxed; and then there are other directions to which I need not refer.

Now the costs which are to be so taxed are costs for work done by Mr. *Porrett*, who is a *Sheffield* solicitor, with reference to certain proceedings in bankruptcy taken by him in *London* at the instance of the Petitioner, the Petitioner being a limited company having its registered offices, as I understand, in *Liverpool*. So that the case may be put in this way—that the client lives in *Liverpool*, the solicitor lives in *Sheffield*; and the work done was done by him in *London*. The solicitor is not within the limits of the *Liverpool* district; the work done was not done within the limits of that district. It so happens that the client, the Petitioner, lives within the district.

Then Mr. *Porrett* says: "You, the District Registrar, have no authority to make an order upon me for the delivery of my bill, and for the taxation of that bill by the District Registrar of *Liverpool*;" and he says: "Even if there is any authority which would warrant such an order as that, this is a case in which the order ought to be transmitted to *London* in order that my bill may be taxed by a *London* Taxing Master."

The question, as I say, put in that short form, is one of importance, because it affects the power and authority of the *Liverpool* and *Manchester* District Registrars to tax the bills of solicitors resident out of their district for work done out of it.

Now it is for those who support the order complained of, to shew under what authority that order was made. Having attended closely to the Act of Parliament, and to the rules (to which I will refer presently), the conclusion at which I have arrived is this, that there is no such authority. It is a negative conclusion, which can only be arrived at by going carefully through the various Acts and rules. Certainly there is nothing in the terms of the *Judicature Act* of 1873, which created these district registries, which authorizes the District Registrar of *Manchester* or *Liverpool* to make such an order as this. There is no Rule which authorizes in terms any District Registrar except possibly the District Registrar of *Liverpool* or *Manchester*, to make any order of the kind at all. It is no part at present of the general law or practice of the High Court that a taxing order such as this can be made by a District Registrar. It is said that there is an exception as regards the District Registries of *Liverpool* and *Manchester*. We must look further into the matter to see whether that exception is established.

Now the order to tax a solicitor's bill is got in one of two ways. There is either a petition of course, or, if there are special circumstances there is a special petition. We need not deal with special petitions, because this is not a case in which a special petition was required. The order on a special petition, as I understand, even now, is always made by the Judge. An order on a petition of course, used to be got at the Rolls. Under the present practice, the order under a petition of course, is made by one of the Registrars of the Chancery Division, under Order LXII., rule 18. That rule refers to petitions which require an answer and to petitions which do not. The difference between the two happens to become of some little importance when we criticise the rules which are relied upon as giving the *Liverpool* District Registrar the jurisdiction or authority which he claims.

So far as the Acts and Rules to which I have referred are concerned, there is no power to make orders for the delivery and taxation of bills to District Registrars of any sort or kind.

But now we come to certain Orders which were made in 1886 and 1887, which do confer upon the Registrars of the *Liverpool* and *Manchester* districts, powers which are not enjoyed by the

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Registrars of other districts. Order XXXV. relates to "proceedings in district registries," and rule 1 and the subsequent rules down to rule 6, begin in this way, "Where a cause or matter is proceeding in a district registry." And rule 6*a* begins, "Where a cause or matter hereafter commenced in the Chancery Division is proceeding in the district registry of *Liverpool*, or in the district registry of *Manchester*, the District Registrar shall act in respect thereof, and throughout all the proceedings therein, as a Chief Clerk of the Judge of the Chancery Division to whom the cause or matter is assigned, and as Registrar and Taxing Master according to directions to be given from time to time by such Judge."

The first point to consider is, What is the meaning of the expression "where a cause or matter is proceeding in a district registry"? "Is proceeding" must mean, is proceeding according to the statutory enactments or the rules made by the proper authority. A cause or matter cannot be said to be proceeding in a district registry simply because it is improperly commenced there; that is not the meaning of the language. The language is addressed to proceedings which are properly commenced, and which are properly proceeding.

Now, is there any authority for making an order of this kind by the Registrar of the district? The question is, Where are we to find it? We cannot find it nor conclude that he has the authority, simply because somebody asks him to make the order. Some further authority must be found.

If we go on, and look at the additional rules which were passed in 1887, we find that the power of the District Registrar to make orders in originating summonses is expressly conferred by sub-rule 1 of the Rule of May, 1887. "Originating summonses may be sealed and issued in the District Registries of *Liverpool* and *Manchester*," and so on. Then comes the 2nd sub-rule: "Petitions presented in the District Registries of *Liverpool* and *Manchester* respectively, and requiring answer, shall be answered in the name of one of the District Registrars of the same respective Registries." Now that applies to one portion of rule 18 of Order LXII., to which I have already alluded. The rule goes on, "and the Rules of the Supreme Court, and, in particular, Order LXII., rule 18, shall, as regards such petitions, be construed

as if the District Registrars of *Liverpool* and *Manchester* respectively were mentioned in place of the Registrars of the Chancery Division." Nothing is said there about orders of course. There is nothing in terms there which confers upon the Registrars of the *Liverpool* and *Manchester* districts any power to make an order of course.

The orders of course which remain according to the present practice are very few. The most important, probably, is the order of course made upon a solicitor to deliver his bill and have it taxed. There are other orders of course which relate to mere procedure; and I do not know, and I certainly do not intend to say, that there is no power on the part of these District Registrars to make orders of course of that sort as to matters which are properly pending before them; I think very likely there is. I think that would come under rule 6*a*, because if that was a cause or matter properly proceeding in the Chancery Division of the district registry, then that district registry would have all the authority of the Chancery Division in the district registry, and could make those orders. But here we are dealing with orders of a totally different kind; they are orders made upon an originating petition, and I cannot find anywhere in any of these rules any authority at all on the part of the District Registrar to make such an order as this; and it is very remarkable, that although there may be orders in some cases, for anything I know, made by District Registrars to tax certain costs relating to matters over which they have jurisdiction under Order XXXV., rule 6*a*, the directions which Mr. Justice *Kekewich* has given as regards even such matters as those, are contained in these words: "On an application against a solicitor for delivery and taxation of a bill of costs and delivery up of deeds, the District Registrar shall hear the application, complete the evidence, and then refer it to the Judge"; so that even in those cases, it is not for the Registrar to make the order; it is for the Judge to make the order. I do not think that that regulation applies to such orders as this. I apprehend that it applies to such orders, if any, as can be properly made under Order XXXV., rule 6*a*, that is to say, orders for taxation in causes or matters commenced in the Chancery Division properly proceeding in the district registry.

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Here we have not a case in which there is a cause or matter commenced in the Chancery Division which was in any sense properly proceeding in that district; we have not that case to deal with, there is no such case before us. Upon the whole, therefore, it comes to this, that you cannot find in the Act or in the rules any authority at all for the District Registrar to make this order.

Under those circumstances it appears to me that the order ought to be discharged, and discharged with costs both here and below, and if Mr. *Porrett* has paid the costs, he must have them back, and if he has deposited any money, that money must be returned to him.

KAY, L.J.:—

I also think that the order made by the District Registrar in this case, is without any vestige of authority. It is an order made on a petition for taxation, which petition need not be answered. It was merely a petition of course, such a petition as used, before these orders, to be dealt with by the secretary of the Master of the Rolls. The old practice which is mentioned in Order LXII., rule 18, was, that upon the presentation of such a petition as this, the order was "drawn up, passed, and entered in the office of the secretaries of the Masters of the Rolls." That order substituted for that practice in the office of the secretaries of the Masters of the Rolls a power for the Registrars of the Court of Chancery to make the order on the petition. The words are, "All petitions which require to be answered"—which this does not—"shall be answered in the name of the Senior Registrar for the time being, and any orders on petitions which, according to the practice formerly prevailing in the Chancery Division, were drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls, shall be drawn up, passed, and entered by or under the direction of the Registrars of the Chancery Division." Then the Registrar of the local district must shew, if he can, how he has got this power, which this rule says must be exercised by a Registrar of the Chancery Division. There is only one way in which it is possible for him to shew that: he must find that power in Order XXXV., rule 6*a*,

or the sub-sects. 1 and 2 of that rule, introduced in May, 1887, and really the only sub-section that applies is sub-sect. 2. Sub-sect. 2 does this, it enables the District Registrars of *Liverpool* and *Manchester* respectively to answer petitions that require an answer, which are presented in those district registries respectively, and it says in terms, that Order LXII., rule 18, which I have just read, "shall, as regards such petitions," that is petitions which require an answer, "be construed as if the District Registrars of *Liverpool* and *Manchester* respectively were mentioned in place of the Registrars of the Chancery Division," but it leaves out, and I have no doubt designedly leaves out, the other part of that rule which refers to petitions that do not require an answer, and upon which the order is made by the Registrars of the Chancery Division, and it does not give to the Registrars of the *Liverpool* and *Manchester* District Registries, any power whatever to make such order. Therefore, that rule does not help them; but, on the contrary, it seems to my mind most clearly to indicate that it never was intended that they should have such a power as this to make orders upon petitions of course. I am speaking now of originating petitions of course, like this petition, which is the one we have now to consider.

Then the only other possible way in which it can be suggested that such a power is vested in the Registrars of the districts of *Liverpool* and *Manchester*, is under the rule 6*a* of Order XXXV. That has been read by Lord Justice *Lindley*. That rule begins, as Lord Justice *Lindley* has pointed out, with the very same words which commence every one of the six preceding rules of Order XXXV., "Where a cause or matter is proceeding in a district registry"; so that the only power that it gives to the District Registrar is, to do the things which are contemplated by this rule in a cause or matter which, at the time, is proceeding in the district registry, and as to that it says (I am not going to read it at length), that "the District Registrar shall act in respect thereof," that is in respect of the cause or matter then proceeding in the district registry, "as Registrar and Taxing Master, according to directions to be given from time to time by the Judge."

Then the argument has been certainly a most courageous one,

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because it is said, "Well, but this is a proceeding which was at the time pending in the district registry, because this is an *ex parte* petition; this originating petition was presented in the district registry, and therefore, when the application was made to the Registrar to make the order, it was a proceeding pending in the district registry." Of course, if that is the construction of the rule, you might make any kind of application you liked in the district registry, and say, "Oh, it is pending because I began it here." It is quite obvious that is not the meaning of the rule. The meaning of the rule is like the meaning of all the rules which preceded it, where a proceeding has to be taken in a pending cause or matter; and it will not do to say that an originating proceeding is a pending cause or matter for the purpose of that rule. But if anybody applies his mind to these rules with the desire of understanding them, the light that is thrown upon this rule which I am now considering by that sub-sect. 2, to which I have already referred, makes the matter clear beyond the possibility of doubt. That sub-sect. 2, as I pointed out, excludes carefully any suggestion of a power to the District Registrar to make an order like this, upon an *ex parte* petition not presented in any cause or matter. Reading the two together, it is simply impossible, in my opinion, to have the least doubt that no such power was ever given to the Registrars in *Liverpool* or *Manchester*, or was intended to be given by these rules. There the matter begins and ends, because, to no other part of the *Judicature Act* or Rules has reference been made, or could be made, with regard to power being given to the District Registrar of *Liverpool* or *Manchester* to make an order of this kind. I think that gentleman has exceeded his authority, and I think the order must be discharged, with the consequences which have been indicated by my learned Brother.

Solicitors: *Jaques & Co.; Fisher, Sandys, & Crosfield, Liverpool.*

M. W.

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Misrepresentation—Prospectus—Action of Deceit—Onus Probandi—Negligence.

If a person who makes a false statement entertains a *bonâ fide* belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reasons. If he had formed no belief whether the statement was true or false, and made it recklessly without caring whether it was true or false, an action of deceit will lie against him. But not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.

The directors of a company for purchasing and working a mine issued a prospectus containing a statement that the reports of certain engineers therein mentioned were "prepared for the directors." The reports were appended to the prospectus, and gave a very favourable account of the mine. The reports were, in fact, prepared for the vendors of the mine with a view to the formation of the company, but there was no evidence that they were incorrect or exaggerated. The Plaintiff took shares in the company on the faith of the prospectus, and the shares having greatly fallen in value, he brought an action of deceit against the directors claiming damages. The Court held, on the evidence, that the directors had no intention to deceive, and used the expression, "prepared for the directors," carelessly, not thinking it important, and without considering the true effect of the words:—

Held (reversing the judgment of *Romer*, J.), that the Plaintiff could not maintain an action of deceit against the directors for the misrepresentation.

In the absence of evidence that the reports were incorrect, *quære*, whether the falsity of the statement that they were prepared for the directors was material.

Peek v. *Derry* (1) discussed.

THE Plaintiff in this action, *J. H. Angus*, alleged by his statement of claim that he had subscribed for 2000 shares of £1 each in the *Valley Gold Company, Limited*, on the faith of a prospectus issued on or about the 27th of October, 1886, by the Defendants, Sir *Charles Clifford*, *Thomas A. Meates*, *Edward M. Nelson*, and *William Lloyd*, the directors of the company.

The company was incorporated on the 25th of October, 1886, to work a gold mine in *California*.

The prospectus contained the following statements: "Full

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reports on the property have been prepared for the directors by the following eminent engineers—Mr. *J. M. Jackson*, Mr. *J. M. Pearson*, Mr. *W. H. Rodda*, and Mr. *Alexander Del Mar*. These gentlemen have personally inspected the property, and Mr. *Del Mar* has advised the board as to the means to be adopted for working and developing the same to the best advantage. These reports have convinced the directors that the estate is a rich one, and they have no hesitation in recommending the shares to the public as a genuine investment."

Extracts from the above-mentioned reports were inserted in the prospectus.

The Plaintiff, by his statement of claim, traversed the above statements, and alleged (par. 8) that the estimates formed by Mr. *Del Mar* were grossly exaggerated; and also that the shares were now of much less value than the price paid. He claimed (1) a declaration that he was induced to take his shares by the misrepresentations contained in the prospectus; and (2) a declaration that the Defendants were jointly and severally liable to make good the loss sustained by him in respect of the shares; and (3) payment of the amount of such loss, or an inquiry.

The prospectus, which was admitted to have been issued by the Defendants, was accompanied by a printed document purporting to contain extracts from a report by Mr. *Del Mar*, dated the 14th of August, 1886; a further report of the same gentleman addressed to the directors of the company, dated the 25th of August, 1886, and reports of the three other engineers named.

The Defendants, in their defence, alleged that it was obvious, from the prospectus and accompanying document, and that the Plaintiff, if he read the same must have understood, that the reports could not have been prepared by Mr. *Del Mar* and the other engineers under instructions from the board of directors. The first report of *Del Mar*, and the reports of the other engineers, were, as the Defendants understood and believed, prepared by them respectively for the purpose of the same being submitted to the persons who should be invited to accept the office of directors of the company; that *Del Mar* was a mining engineer and expert of well-known reputation, and before the Defendants respectively consented to act as directors of the company, he made to them

the second report, and advised them, both by that report and also verbally, as to the means to be adopted for working and developing to the best advantage the property to be acquired by the company. And by par. 6, the Defendants stated that they did not admit that the estimates formed by *Del Mar* were grossly or at all exaggerated; but even if this was the fact, the Defendants had no reason to believe that it was so, and submitted that the allegation, if true, was irrelevant.

They further denied that they had any knowledge of facts inconsistent with the statements in the prospectus, as fairly and reasonably construed.

Before the hearing the Plaintiff's solicitors wrote to the Defendants' solicitors informing them that they would not go into evidence in support of the allegations in the 8th paragraph of the claim. No proof was therefore offered that the reports were in substance untrue.

It appeared on the evidence that the report of *Pearson* was made in 1884, and *Jackson's* and *Rodda's* reports in January, 1886. The Plaintiff relied mainly, if not entirely, on the reports of *Del Mar*.

It further appeared that *Del Mar* had, in making his first report, been acting on the instructions of Messrs. *Beachcroft & Gordon*, the vendors' agents in this country, who were engaged in promoting a company to purchase the property; while the second report, although it was made to meet certain objections and questions raised by the Defendant *Meates*, was made before any of the Defendants had agreed to act as directors; and his Lordship held that neither report had been made on the instructions or on behalf of the directors or in the interests of the company, but that both had been made to be submitted to persons with a view to induce them to become directors.

The company had been unsuccessful; and it was admitted that the shares were less valuable, although it was alleged by the Defendants that the value of the property had not fallen.

The Plaintiff was examined, and swore that he understood the statements in the prospectus to mean that the reports had been made under the instructions of the directors, acting in the interest of the company, and that he was induced by those statements

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to take the shares. He admitted that he did not know any of the directors, but relied almost entirely on the report of Mr. *Del Mar*.

The Defendants were examined as to the meaning they attached to the words "prepared for the directors," and their object in allowing the words to be inserted. None of them gave very clear answers to the questions on this subject. The Defendant *Nelson* said that he attached no importance to the words. The Defendant *Meates* said that he did not consider the meaning of the passage very carefully. The Defendant *Lloyd* said that he understood the words to be an equivalent to "adopted by the directors," and that he did not attach any importance to the particular expression "prepared for," and never thought it would mislead anyone. The Defendant, Sir *C. Clifford*, said that he did not attach any importance to the words. All the Defendants denied that they had any intention to deceive.

The action came on for hearing before Mr. Justice *Romer* on the 1st of December, 1890.

Sir *Horace Davey*, Q.C., and *T. R. Hughes*, for the Plaintiff:—

The Plaintiff has proved an untrue allegation of a material fact, by which he was induced to act. We submit that the statements in the prospectus could have only one meaning, viz., that which the Plaintiff has sworn he attached to them; but even if they were ambiguous, he has put a reasonable interpretation on them, and is entitled to maintain this action: *Smith* v. *Chadwick* (1), and it is not necessary for him to prove that the reports were exaggerated.

Rigby, Q.C., *Asquith*, Q.C., and *Grosvenor Woods*, for the Defendants:—

If the reports are true, it is immaterial for whom they were taken; if untrue, it is no doubt most material. But the Plaintiff relied, not on his knowledge of the directors, but on the report of Mr. *Del Mar*; and now that he has withdrawn his allegation as to the exaggeration and falsity of the report, he cannot be heard to say that he has been injured by the fact that

(1) 9 App. Cas. 187.

the reports were not made on the instructions of the directors. In an action of deceit, as this is, the Court is not bound to put on the language of the prospectus the meaning which is the most unfavourable to those issuing it, although it might be otherwise in an action for rescission. As the Plaintiff declines to shew that the reports are inaccurate, the Court cannot say that the Defendants have been guilty of a fraud because a mistake may have been made in leading persons to suppose that a report which was made under the instructions of the vendors' agents had been made under their own.

The question of damage in a case like this was discussed in *Peek* v. *Derry* (1), and it was said that the amount of damages would be the difference between the price paid for the shares and their real value at the time of the allotment. But in this case it will not be fair to take subsequent depreciation into account, as the Plaintiff does not dispute the accuracy of the valuation of the property; and although the shares have fallen in value, we do not admit that the value of the property has fallen. There must be an inquiry as to damages.

ROMER, J.:—

The Plaintiff in this action is a Mr. *Angus*. The Defendants are the directors of a company called the *Valley Gold Company, Limited*. The action is one for damages caused to the Plaintiff, as he alleges, by his being induced to take shares in the company by certain alleged untrue statements contained in the prospectus inviting subscriptions for shares in the company, and which was issued by or under the authority of the directors.

There is no question in this case but that the Defendants are responsible for the prospectus, and that if the prospectus makes those who issued it liable for the statements contained in it, the Defendants are liable accordingly. It is not disputed that the Plaintiff applied for shares in the company on the faith of the prospectus, and was allotted shares accordingly; and on the evidence before me it is clear that there has been some loss, at any rate, accruing to the Plaintiff by reason of his having been induced to take these shares.

(1) 37 Ch. D. 541.

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The real question in issue in this action is, whether certain statements in the prospectus were or were not untrue in fact, and inserted under such circumstances in the prospectus that the Defendants are liable for the statements. The statements are these. [His Lordship read the statements already set out.]

The first question that arises is, what meaning would be naturally attributed to those statements by an ordinary reader? I think that any ordinary reader would come to the conclusion that what was meant was that the engineers referred to had been instructed by the directors to report to them, in the interests of the company, as to the property, so that they might see whether it was or not a property which they might be advised to purchase. That is how I should read those statements. But whether it be or not the meaning of the statements, it clearly is a meaning to be attributed to them. And the next question arises whether the Plaintiff has himself attributed that meaning to them? The Plaintiff has given his evidence in the box, and has been cross-examined, with the result that he has established before me the fact that he did attribute to those statements the meaning I have given them, and that, acting on the belief that that was the meaning of these statements, he applied for shares, which were allotted to him. The Plaintiff was not in any way shaken on cross-examination. He was a good witness, and I believe what he said.

The next question arising in the case is this. Assuming these statements to have had the meaning I attribute to them, were the statements true? Beyond all question, I think they were not true, so far as concerns the reports of Messrs. *Jackson*, *Pearson*, and *Rodda*. But it is said, and truly, that what the Plaintiff chiefly relied upon were the statements with reference to Mr. *Del Mar's* report; and it is said on behalf of the Defendants that, as applied to that report, the statements were in one sense true, and evidence was given by the Defendants in support of that allegation. But on the evidence I come to the conclusion that the statements, even as applied to *Del Mar's* report, were not true in any fair sense. In fact, when the Defendants, who were all examined, were asked to explain what meaning they attributed to those statements as to the reports, they were unable

to my satisfaction to explain what meaning they actually did put on the statements. On the whole of the evidence, I think it is clear that the first report of Mr. *Del Mar* was not prepared either on the instructions or on behalf of the Defendants, nor in the interests of the company; and as regards the second report, also, although the evidence as to this was rather fuller, I come to the conclusion that that report also was in no true sense made at the suggestion or on the request of the Defendants, or required on their behalf—in other words, that the second report stands on the same footing as the first. Mr. *Del Mar* was not called on behalf of the Defendants; but I gather from the evidence that, in making his second report, he was acting in a certain sense for the vendors; for, assuming the vendors to be the promoters of the company, he was trying to provide directors for them. It also appears from the evidence that he was instructed to make reports by the vendors' agents in this country, Messrs. *Beachcroft & Gordon*, and was to be paid by them. They, not the directors, were his employers. The report purported to be addressed to the directors of a company not then formed. At the time when this report was made, no director of the company had, in fact, been constituted or agreed upon, and I have come to the conclusion that the report was addressed in that way because undoubtedly Mr. *Del Mar* thought of submitting a report to certain persons with a view to inducing them to become directors. The report of Mr. *Del Mar*, in my opinion, was not prepared for the directors of the company in any true sense, in any fair sense—perhaps I may say in any sense except in that in which any vendor's expert making a report for the benefit of his employer, may contemplate the probability of that report being used for the purpose of inducing persons to become shareholders. In no other sense could Mr. *Del Mar's* report be considered as prepared for the directors. Nor, in my opinion, has it been proved that Mr. *Del Mar* advised the board as to the means to be adopted for developing the property.

The result is, that in my opinion the statements which were relied on by the Plaintiff were not true, and I think that the Defendants were not justified in allowing them to be inserted in the prospectus. In fact, looking at the circumstances, as stated

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by some of the Defendants in the box, under which the prospectus was allowed to go out, I think it is clear that no proper care was taken by the Defendants with reference to those statements.

The next question to consider is, whether the statements are material. I think they are. I think that any person who is considering the statements in a prospectus given by experts as to the value of the property to be acquired and worked by the company, would be very much influenced by considering the question in whose interests, and by whose instructions, the reports of the experts had been prepared. Looking at the question as men of business; no one who knows anything about the affairs of life would, I think, deny that whether in the case of reports by experts on the value and nature of a property, or of the valuation of property by experts, it is most material to know on whose behalf they were acting. In considering the question as between vendor and purchaser, I suppose theoretically that it ought to make no difference on whose behalf an expert is employed to report on or value a property. If experts were perfect men, and could be relied upon to make reports as if they were calculating machines, it would of course be immaterial; but in the practical affairs of life it does make a considerable difference by whom an expert is employed. For example, could any one say that it made no difference in considering the price to be paid for a property, whether that price had been fixed by a valuer for the vendor—or a valuer for the purchaser? Of course, no one would say so. Would any prudent purchaser buy a property at the valuation of a valuer instructed by and acting for the vendor? I think not. In cases of light, or patent cases, would either side like to have the case decided, only so far as concerned expert witnesses, by the testimony of experts of the other side? Certainly not. Therefore, it appears to me that it was a very material thing for the Plaintiff to know in this case when he applied for the shares whether the reports to which his attention had been called by the prospectus were reports (putting it substantially) given by experts employed by the vendors or by experts employed by the purchaser. In my judgment the statements in question were material and did influence the Plaintiff.

But then it was said that the statements ceased to be material because the Plaintiff had not taken on himself the burden of proving that the reports of the experts in question were untrue or exaggerated. It was said on behalf of the Defendants, and said truly so far, that there was inserted in the statement of claim an allegation that "the estimates formed by Mr. *Del Mar* were grossly exaggerated," and that subsequently, by a letter passing to the Defendants' solicitors from the Plaintiff's solicitors, the Defendants' solicitors were informed that the Plaintiff did not intend to adduce evidence in support of that allegation, and that therefore the Defendants need not be prepared with evidence to rebut that part of the case. The correspondence with reference to that allegation does not, I need scarcely say, amount to an admission by the Plaintiff that the reports were in every sense true and unexaggerated, still less an admission by him that Mr. *Del Mar*, in making his reports, was not influenced by the consideration of the persons by whom and on whose behalf he was employed. It amounts at most to this, that the statement might be considered as struck out.

Now, is the Plaintiff in a case like this bound to prove that the experts' reports were untrue or exaggerated? I think not. It is impossible to say how, or to what degree in each particular case, an expert, in making a report or valuation, is influenced by the consideration of the position of the person by whom or on whose behalf he has been instructed to act. It is impossible to gauge it, and I think that the Plaintiff in this case would have taken upon himself a task which he could not fairly be asked to discharge, if he had sought to establish here how far and to what extent Mr. *Del Mar* had been influenced by the consideration I have referred to. I think that the Defendants' view under the circumstances is correct, namely, that contained in the 6th paragraph of their defence, in which they submit that the allegation, if true, is irrelevant. I think that the Plaintiff was not bound to go into evidence in support of his allegation.

The result is, that I hold that the misrepresentations were material and substantial. I might illustrate what I have said by a consideration like this. Suppose that in a prospectus there had been a representation to the effect that the purchase-

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money had been fixed by the valuer of the purchaser—that is the company's directors, and it turned out that in fact it had been fixed by the vendor's valuer, would a person subscribing for shares on the faith of that statement in that case be entitled to no relief unless he also proved that the vendor's valuation was wrong? Distinctly he would be entitled to relief. Who can say in the present case how Mr. *Del Mar* might have modified his report had he known that he was acting in the interest of the purchaser, in this case the company, that he was instructed by the directors, that they were his employers? No one. Certainly Mr. *Del Mar* has not been called, and under the circumstances of the case I hold that the misrepresentations contained in the prospectus were material and not the less so because the Plaintiff has not taken upon himself to go into evidence to shew that the statements in Mr. *Del Mar's* reports were either grossly exaggerated, or exaggerated, or untrue.

It follows, in my judgment, that the Defendants are liable for the loss and damage which has accrued to the Plaintiff by reason of his having been induced to take the shares mentioned in the statement of claim by the prospectus. It has been agreed on both sides that in a case like this it is not advisable that the Judge should be called upon to assess at once the amount of damage. I accordingly make a declaration according to the first and second paragraphs of the claim, and direct an inquiry as to the amount of damages, without giving any direction as to the principle on which they are to be assessed. The Defendants will pay the costs of the action up to and including the hearing, and I reserve the costs of the inquiry.

A. C. E.

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From this judgment the Defendants appealed.

The appeal came on for hearing on the 13th of April, 1891.

Rigby, Q.C., and *Grosvenor Woods* (*Asquith*, Q.C., with them), for the Appellants:—

The only misrepresentation alleged against us which can be established is that we represented the reports to have been made for the directors, whereas they were made for the agents who brought out the company. It is not alleged that the reports

were inaccurate. The Plaintiff also relies on the statement that the Defendants were "convinced" by the reports and alleges that it is untrue; but the evidence quite disposes of that, for it is clearly made out that the Defendants were convinced by them, and honestly believed that the undertaking was a very advantageous one. There is no doubt now as to the state of the law; a mere false statement is not conclusive evidence of fraud; that it has been made carelessly or with a belief in its truth which rested on no reasonable ground is not enough to support an action of deceit; it is necessary to prove dishonesty. The law is laid down by Lord *Blackburn* in *Smith* v. *Chadwick* (1). Since the decision in *Peek* v. *Derry* (2) dishonesty must be made out. We cannot say that it was a happy or correct expression to describe the reports as "made for the directors," but a director before whom the draft prospectus was laid might pass it with perfect honesty. *Del Mar's* report, the one relied on, was in a popular sense prepared for the directors, having been prepared for their information. As to the other reports, the statement was simply careless; the notion that "for the directors" would deceive anybody never came into the mind of any of the Defendants. *Glasier* v. *Rolls* (3) supports our case. It is also an important consideration that Mr. Justice *Romer*, who saw and heard the witnesses, does not find fraud; and the Court of Appeal, which has not seen or heard them, will not readily infer fraud where he has not done so.

Sir H. Davey, Q.C., and *T. R. Hughes*, for the Plaintiff:—

Neither the Defendants nor their counsel say that any of the Defendants believed the statement that the reports were made for the directors to be true. The decision of this Court in *Peek* v. *Derry* (4) went on the ground that a person who makes statements to another person with a view to his acting upon them owes him a duty to take reasonable care as to their accuracy, and that neglect of that duty would lay ground for an action. The House of Lords only decided that there is no legal duty on a person making representations to take care that they are accurate,

(1) 9 App. Cas. 187, 201.
(2) 14 App. Cas. 337.
(3) 42 Ch. D. 436.
(4) 37 Ch. D. 541.

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but it never laid down that a person is not liable if he makes a representation without a belief that it is true, or if he makes it recklessly without caring whether it is true or false. Nobody has suggested any sense in which the statement in the prospectus could possibly be true as to the earlier reports. The Defendants say they were thinking only about *Del Mar's* report; but they never thought about the matter at all till the actions came, and then they attach a meaning to the expression which is only applicable to *Del Mar's* report. Nobody is bound to believe a man who says that three years ago he put a particular unnatural meaning on an expression he used. Having regard to the language and purposes of the prospectus, the expression can only be understood in one sense. The directors now say that these reports were prepared for their information, to enable them to determine whether they should become directors. If they had put that into the prospectus they would have had no chance of subscribers. Therefore it is a material misrepresentation to say that the reports were made for the directors. The value of an estimate depends entirely upon the character and capability of the person who made it, and the object for which it was made. If the Defendants had satisfactorily proved that the reports were true, and that the mine was worth as much as it was estimated to be worth, the statement that the reports were made for the directors might be immaterial; but they have not done so, although the *onus* was on them; and the truth of the reports being uncertain, the statement becomes material. But, in fact, the evidence tends to shew that the value of the mine was greatly exaggerated. The mine has been practically unproductive, and has not been found to pay the expense of working.

We do not dispute the law laid down by the House of Lords in *Peek* v. *Derry* (1); but we say that if there was no intention to deceive on the part of the Defendants, they have been guilty of culpable recklessness amounting to fraud. The Defendants say they did not attach the same meaning to the words "prepared for the directors" as the Plaintiff does; but they cannot give a satisfactory answer to the question what they did mean. They had never formed any judgment as to their meaning. If a man

(1) 14 App. Cas. 337.

adopts a false statement without forming any belief or judgment what the statement means, he must be taken to mean what the words usually mean; and if they tend to deceive the reader, he must be taken to have intended to deceive. A man intends to do what is the natural consequence of his actions or words. According to their own evidence the Defendants have been guilty of such carelessness as brings them within the words of Lord *Herschell* in *Peek* v. *Derry* (1). They made the statement "recklessly, careless whether it be true or false," and ought therefore to be held liable as if they had made the statement knowing it to be false: *Smith* v. *Chadwick* (2); *Arnison* v. *Smith* (3); *Brownlie* v. *Campbell* (4).

Rigby, in reply.

LINDLEY, L.J.:—

This is an action brought by the Plaintiff against four of the directors of the *Valley Gold Company, Limited*, and the object of the action is to make them responsible for any loss which the Plaintiff has sustained by being induced to take shares in that company upon the faith of the prospectus, which is said to be false and fraudulent. Mr. Justice *Romer* has pronounced judgment in favour of the Plaintiff, and the appeal is by the Defendants.

No question arises here as to several matters which are very often in controversy in cases of this description. It is conceded that the Plaintiff applied to the company for shares on the faith of this prospectus, and got his shares direct from the company. Again, it is conceded that these four gentlemen are responsible for the issue of the prospectus; there is no controversy about that. Neither is there any controversy that the Plaintiff took his shares on the faith of the prospectus. The company was registered on the 25th of October, 1886, and the prospectus was issued on the 27th of October, 1886—that is to say, two days after the registration. Certain reports are referred to in the prospectus, which I will allude to presently, and I will merely state now that the

(1) 14 App. Cas. 374.
(2) 20 Ch. D. 27, 44; 9 App. Cas. 187.
(3) 41 Ch. D. 348.
(4) 5 App. Cas. 925.

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evidence shews that those reports were made at various dates. One of them, which was *Pearson's*, was made as early as 1884, and was made for and addressed to the vendors of this gold mine, and not to the *Gold Valley Company*, or the directors of the *Gold Valley Company*. Two other—namely, *Jackson's* and *Rodda's*—reports, were made on the 4th and 16th of January, 1886. One of them is said to have been made in 1884, and re-made in 1886, but I do not attach much importance to that. It was made in January, 1886; but the two most important reports were made by a Mr. *Del Mar*, and were dated on the 14th and 25th of August, 1886, and these two were addressed to the directors.

Those being the facts relating to the reports, I will proceed to call attention to what this prospectus says. The prospectus is headed: "*Valley Gold Company*." It says: "This company has been formed to purchase and develop a gold property, situated in *San Bernerdino* county, *California, United States*"; then it describes the nature of that in a few words, which I need not refer to; and then occurs this passage: "Full reports of the property have been prepared for the directors by the following eminent engineers: Mr. *Jackson*, Mr. *Pearson*, Mr. *Rodda*, and Mr. *Del Mar*. The gentlemen have personally inspected the property, and Mr. *Del Mar* has advised the board as to the means to be adopted for working and developing the same to the best advantage. These reports have convinced the directors that the estate is a rich one, and they have no hesitation in recommending the shares to the public as a genuine investment." But the Plaintiff says that he was induced to buy shares in this company upon the faith of the statement, amongst others, that full reports on the property had been prepared for the directors, and he says that that was untrue; and his contention is, that he is entitled to relief upon that ground—on the ground, that is, that these gentlemen issued this prospectus containing that untrue statement, and a statement which they knew to be untrue. Therefore, he founds his claim to relief on the ground of fraud on the part of those gentlemen.

Now, the judgment of Mr. Justice *Romer*, curiously enough, does not find, as a fact, that these directors, or any of them, were

guilty of fraud. His judgment proceeds upon this footing. First of all, upon the true construction of this clause, he comes to the conclusion that "prepared for the directors," means prepared for them in the sense that they were the persons employing the engineers to make the reports; and that in that sense the statement is untrue. Then he comes to the conclusion that that statement, being untrue, was material; and then he rather appears to have proceeded upon the theory, that that alone would be enough, without addressing his mind to the further question whether these gentlemen would be liable, supposing that they did make this untrue statement, but made it carelessly, as distinguished from fraudulently. His judgment, when we read it carefully, shews upon the face of it, I think, that his mind was not addressed to that particular point, which was the point mainly argued before us. The judgment, so far as I read it, seems to me quite consistent with his having proceeded upon the view that *Peek* v. *Derry* (1), as decided in this Court, was law, whereas it was reversed by the House of Lords (2), as we all know. I have spoken to the learned Judge about it, and the inference which I should draw from his judgment is, I think, warranted by the fact that he says his attention was called to the other points rather than to this. That explains why there is no distinct finding of fraud on the part of these gentlemen.

But it is important to bear in mind that the Judge who saw these witnesses, and heard their evidence, has not found them in terms guilty of fraud. That raises a question of very considerable importance. Before *Peek* v. *Derry* was reversed in the House of Lords, I should have thought there would have been no doubt, and could have been no doubt, that this action might have been supported, and would have been supported, upon the evidence adduced in the course of the proceedings. But *Peek* v. *Derry* having been reversed by the House of Lords, it becomes important to see what *Peek* v. *Derry* decided.

Speaking of *Peek* v. *Derry* broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent misrepresentation, as distinguished

(1) 37 Ch. D. 541. (2) 14 App. Cas. 337.

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from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and, as I understand *Peek* v. *Derry* (1), it settles that question in this way—that an action for a negligent, as distinguished from a fraudulent, misrepresentation in a company's prospectus cannot be supported; I think it is perfectly impossible to read the judgments which were delivered in that case, especially Lord *Herschell's*, to which I will allude presently, without seeing that that is the broad proposition of law which *Peek* v. *Derry* has settled, and settled for good.

That being the case, it becomes necessary, to examine the evidence, and see whether this misstatement—for misstatement it obviously was—is to be regarded as fraudulent, or is to be regarded as negligent only. If the conclusion is that this was a case of negligence as distinguished from fraud, the action will not lie. If the evidence is that there was a fraudulent, as distinguished from a negligent, misrepresentation, the action will lie.

Now the case put for the Plaintiff is based upon what Lord *Herschell* said. I take his judgment, as it is the leading judgment in the case, although there are passages of importance in the other judgments, and I will take what he says at pages 374, 375, and 376, which appears to me to contain the pith of the decision. He says at page 374, "I think the authorities establish the following propositions. First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1.) knowingly, or (2.) without belief in its truth, or (3.) recklessly, careless, whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly

(1) 14 App. Cas. 337.

alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

The Plaintiff's counsel naturally relied upon that statement, and in particular upon this—that fraud is proved, not only that there is evidence of it, but that it is proved, when it is shewn that a false representation has been made knowingly or without belief in its truth. They say here you made this false statement knowingly, you knew what the facts were, and you made it without any belief in its truth. And if that were the whole of the judgment, I do not think it would be easy to answer that argument. But then one must look a little further to see what Lord *Herschell* says on pages 375 and 376. At page 375 there is this passage which is a qualification. I have read it, and to my mind it qualifies the former statement in a most material manner: "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds." Therefore, you may have, as I understand it, a false statement made, but made without the matter being present to your mind, and made carelessly; and, if that is the fact, that is not fraud, but carelessness, for which an action will not lie. Then at page 376, pursuing the same line of thought, the learned Lord says: "I think there is much to be said for the view that this moral duty" (that is to be vigilant in preparing these prospectuses, and stating no more than you believe to be true) "ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the Legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the distinction between carelessness and fraud, and equally holding a man

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fraudulent whether his acts can or cannot be justly so designated."

Now my observation upon that is this, that when you read the whole of that part of the judgment, you must take the observations on page 374, as to what is said about proof of fraud, as subject to this, that the matter to be inquired into is, fraud or carelessness. If it is fraud, it is actionable, if it is not fraud, but merely carelessness—it is not. The passages about knowledge—knowingly making it, and making a statement without believing its truth, are based upon the supposition that the matter was really before the mind of the person making the statement, and, if the evidence is that he never really intended to mislead, that he did not see the effect, or dream that the effect of what he was saying could mislead, and that that particular part of what he was saying was not present to his mind at all, that I should say is proof of carelessness rather than of fraud.

These gentlemen read this prospectus, that is plain enough, and I do not understand that any point is made with reference to that part of the prospectus which states that they "have convinced the directors that the estate is a rich one." There is no evidence to shew that the reports of these gentlemen are false in fact. The evidence I think is simply this, that the gold mine has not been worked, and the shares are now worth very much less than the Plaintiff gave for them, not an uncommon result. When we look at the balance sheet which was handed up, I think we see the reason of that. There was so much to be paid for purchase-money that they could not get capital enough to work the mine, and in point of fact, the mine has not been worked yet. Whether it ever will be I do not know, but in the meantime the shares have gone down. I merely mention that as shewing that I do not think any reliance was really placed on this part of the prospectus, which says that the reports convinced the directors of the goodness of this speculation. They were convinced of it.

We must look at the evidence, therefore, to see whether the statement, that these reports had been prepared for the directors, was made by them fraudulently or carelessly. In order to in-

vestigate that question, the four directors cannot all be lumped together. We must look at each of them, and see what each of them said about it. Without reading the evidence at any length it appears to me, I confess, that as Mr. Justice *Romer*, who has seen them, has not found them guilty of fraud, it would not be right for us to find them guilty of fraud. The conclusion at which I have arrived from their evidence is this, that they really did not put the statement complained of into the prospectus with the idea that it was likely to mislead; it was a blundering statement, and their attention was never specifically called to it. It was not that they shut their eyes, and did not care whether it was true or false; but they did not see the effect of what they were saying, or the construction which would be put upon it when those words "for the directors" were passed by them. If those words had been out, I doubt very much whether it would have made any difference. And I can easily understand a man reading the prospectus, and not observing the importance of those words at all. An ordinary reader would be just as likely to overlook them as to see the force of them and give his mind to them. If that is the result of the evidence, if the Defendants passed the words over without seeing that they were of any importance, that appears to me carelessness, and not fraud within the legal definition.

As regards the evidence, as I have said, we must consider the case of each of them separately. The first is Mr. *Nelson*. He says that he attached no importance to the statement. I believe him; because it appears to me, as I said before, that a man might very well read this prospectus and be convinced by it, if he trusts to the man who made the report, and not see the importance of the words "for the directors," on which the Plaintiff has fastened in order to throw the liability on the directors.

As regards Mr. *Meates*, some part of his evidence is unsatisfactory—and, in fact, the learned judge said so—but he also says that he did not consider the meaning of the passage very carefully; and my impression is that notwithstanding the unsatisfactory answers given by him to some of the questions put to him, he never gave his attention to this statement. I do not think

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he wilfully shut his eyes. I do not think he observed it any more than Mr. *Nelson*.

Mr. *Lloyd* appears to have put this view upon it, that he read "prepared for" as an equivalent for "adopted by." He did not attach any importance to the particular phrase "prepared for." The real truth was that they had it laid before the directors—and there is some evidence that some of them gave some directions, and that *Del Mar's* report might have been said to have been prepared for them; but it is impossible to say that of *Pearson's*, *Jackson's*, or *Rodda's* reports. Therefore, I pass that by. Then he says he did not see that that expression would mislead, and never dreamed that it could mislead.

Then Sir *C. Clifford* was the other Defendant. His evidence, I should think, would shew that he was not particularly clear-headed. I have not had the advantage of seeing him, but he also says that he attached no importance to these words. His evidence, as I say, convinces me that there was not the slightest intention to deceive on the part of that gentleman; he never dreamed of such a thing.

The conclusion at which I have arrived is that none of the Defendants saw the importance of that phrase at all; their attention was never directed to it. It is not that they adopted the prospectus, saying: "We do not care what you put in; put in what you like." That would have been recklessness. There was no moral obliquity in what they did; it was pure blundering, pure carelessness; and that being the case, it appears to me that after the decision in *Peek* v. *Derry* (1), this action cannot be maintained. It is a case of negligent, as distinguished from fraudulent conduct. That entitles the Defendants to our judgment. But now as to costs. That is a different matter. I am bound to say that I think the statement was grossly careless, and was such a statement as to invite an action, and therefore I think the Defendants ought not to have their costs. The decision appealed from ought to be reversed, and judgment ought to be for the Defendants without costs.

I have said nothing at present about a matter upon which I do not intend to rest my judgment, but it is not altogether

(1) 14 App. Cas. 337.

irrelevant, and that is the materiality of the statement, that these reports were prepared for the directors. I am not prepared to say that that is a material statement, in the absence of evidence that the reports were untrue, of which there is none at all; and what makes me not prepared to say that it is material is this, that if you assume the reports to be true I cannot see the materiality of it. I cannot see that it matters in the least for whom they were prepared if they were true. I do see that it is open to the observation which was made by Sir *Horace Davey* that it is material in the absence of knowledge whether they are true or false. But I feel very considerable doubt whether in the absence of evidence that these reports were not true—that statement is material. But, as I say, I base my judgment purposely on the broader ground, that after *Peek* v. *Derry* (1) an action of this kind cannot be supported without proof of fraud, an intention to deceive, and that it is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is of course fraud.

BOWEN, L.J.:—

I am of the same opinion. The learned Judge in the Court below, as I understand his judgment, and I have read it more than once since the argument, has not found fraud, nor did he intend to find it. And the inquiries which the learned Lord Justice has made of the learned Judge have convinced me after my examination of his judgment that my conclusion about its effect was correct, and that the idea of the honesty or dishonesty of that statement was not before his mind when he gave his judgment. That being so, ought we upon these materials to find fraud as against persons whom we have not seen in the witness box, and upon these slight materials? I can only say that I do not feel satisfied after having read the evidence very carefully, upon these materials, that there was any dishonesty at all, although I am satisfied that there was very gross and, speaking for myself, culpable carelessness in the use of their language. But that is not a fraud. I think Sir

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Horace Davey said what was quite true about *Peek* v. *Derry* (1). I am satisfied that what *Peek* v. *Derry* did was to decide that there was no legal duty cast upon persons in such cases to take reasonable care in forming their belief—that is to say that negligence in forming their belief did not give rise in such cases to a cause of action. *Peek* v. *Derry* certainly did not alter the old law about deceit. Actions of deceit, that is for damages for fraudulent statements were only brought, before the *Judicature Act*, upon the common law side of the Court, and therefore I can speak with more confidence about them than I should upon a matter which was not purely a common law matter. I venture to say that there is not a lawyer living who has ever heard the law laid down in an action for deceit (that is for damages for fraudulent misrepresentation) except in one way, and that is the way in which *Peek* v. *Derry* has decided. In saying that I am not closing my eyes to the very great importance of *Peek* v. *Derry*, in deciding what I think Sir *Horace Davey* is right in saying it did decide, that an action will not lie for negligence in forming the belief. That is a different point, and a point on which I can understand persons coming to the view with great reason, that the law of *England* ought to recognize such a legal duty, but *Peek* v. *Derry* has decided that in the absence of legislation the present law does not do so.

But as to the form in which juries were directed in the old common law actions of deceit, I do not believe there is any common lawyer living who would put it differently. It always has been the law that a man must have a belief, because, as Lord *Bramwell* points out in the case of *Smith* v. *Chadwick* (2) and Lord *Herschell* in *Peek* v. *Derry*, a man who affirms that he knows a thing, affirms implicitly that he believes it, and if he does not believe it, that affirmation is false. It is not the less false because the affirmation he makes is an affirmation about the state of his own mind. A man may tell a lie about the state of his own mind, just as much as he can tell a lie about the state of the weather, or the state of his own digestion. It makes, to be sure, the inquiry a difficult and complicated one, and probably an obscure one, as to what the state of his mind

(1) 14 App. Cas. 337. (2) 9 App. Cas. 203.

may have been, but once arrive at the inference of fact that the state of his mind was to his own knowledge not that which he describes it as being, then he has told a lie, just as if he made an intentional misstatement of something outside his own mind, and visible to the eyes of all men. A great deal of the argument which has been addressed to the Court, arises, as it seems to me, under cover of the fallacious use, first of all, of the principle that you cannot look into a man's mind. It is said you cannot do that: therefore, what follows? It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. There is nothing outside his mind which is an absolute indication of what is going on inside. So far from saying that you cannot look into a man's mind, you must look into it, if you are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud. It seems to me that a second cause from which a fallacious view arises is from the use of the word "reckless." Now, what is the old common law direction to juries? And it is not because I think that common law is better than equity that I go back to it—but it is because an action for deceit is a common law action—the old direction, time out of mind, was this, did he know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false, and without caring? Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn—evidence which consists in a great many cases of gross want of caution—with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.

Now, whether you take the inquiry in the one order, or in the

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other, whether you regard it from the point of view which is indicated in the expressions which are well known to the common law, and which have been used by Lord *Herschell* and Lord *Bramwell*, that a man is bound to have some honest belief in a statement if he makes it, or whether you treat the matter in the inverse order, with regard to the necessity of finding at least some recklessness to truth, that is to say, some indifference to truth which amounts to dishonesty, in either view it seems to me the result is the same. A man ought to have a belief that what he is saying is true; but a man may believe what he is saying—the expression which he uses—to be true, because he is honestly using the words in a sense of his own, which, however inappropriate, however stupid, however grossly careless, if you will, is the special sense in which he means to use the words, without any consciousness being present to his mind that they would convey to other reasonable persons a different sense from that in which he is using them—a man may believe a statement in that sense of his own, and yet the use of the language may be wholly improper, that is to say, in respect of want of caution in the use of it. It does not follow because a man uses language that he is conscious of the way in which it will be understood by those who read it. Unless he is conscious that it will be understood in a different manner from that in which he is honestly though blunderingly using it, he is not fraudulent, he is not dishonest. An honest blunder in the use of language is not dishonest. What is honest is not dishonest.

Lord *Blackburn*, in *Smith* v. *Chadwick* (1), points that out. The Lord Chancellor, in *Arnison* v. *Smith* (2), points it out. The Lord Chancellor points it out again in *Peek* v. *Derry* (3), as well as Lord *Herschell*, Lord *Bramwell* and Lord *Watson*, who agree with him.

Now what is the finding of Mr. Justice *Romer*? He finds that the language used was untrue in its ordinary acceptation, that it was untrue in any fair sense of the word, and with that I agree. He finds that the Defendants are not able to explain to his satisfaction what meaning they attached to the words and

(1) 9 App. Cas. 187. (2) 41 Ch. D. 348.
(3) 14 App. Cas. 337.

that they differ in the meanings they attach to them. Some of them in cross-examination gave an explanation which is not exactly the same as the others gave. He finds that they cannot give any satisfactory explanation as to what they did mean, and that they were not justified in allowing the words to be inserted. All those findings are perfectly consistent with carelessness in the use of words, and in their having through carelessness allowed words to pass into the prospectus which they were using in one sense, and which it did not occur to their minds would be understood in the other and more correct sense. It is consistent with that finding that the words though used with blamable want of caution, were, nevertheless, in the sense in which the person used them, used honestly. Therefore, the *sequitur* which the learned Judge expresses or arrives at does not follow—it would not follow until you ask yourself, "After all am I convinced this was dishonest?"—and until you have answered that question in the affirmative. The learned Judge, when this point is mentioned to him, says he did not apply his mind to it, so that we were correct in our reading of his judgment that he did not draw that inference of fraud. Now ought we to draw it? No word of mine shall exculpate these Defendants from what I think is gross want of caution. I believe their language is language from which people might draw such an inference, but I think people would hesitate to draw it unless they had seen the Defendants, and heard their cross-examination. Upon the materials which we have, I put myself in the position of the jury, and ask myself, reading this evidence over and over again, am I satisfied that the Defendants were dishonest, am I satisfied that this want of caution, and this clumsy language and this wrong use of language meant dishonesty? I do not feel satisfied of that. My inclination is rather to think that it did not. But I am certainly not prepared, when the learned Judge himself, who saw the witnesses, did not find dishonesty, myself to take the step of saying that their language was dishonest. I doubt very much whether it was.

I want to point out also, that you cannot in an action for deceit lump all the Defendants together, and treat their case as if it was identical, you cannot yoke a careless man with a

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man who is dishonest, and treat the carelessness as being the same thing as the dishonesty, because the two men unite in the same conduct. You must carefully come back and ask yourself, with regard to each of them, is he dishonest? Each of the Defendants has a right to have his case tested by itself. I have, therefore, endeavoured to go through the evidence seriatim with the assistance of the comments which have been made by Sir *Horace Davey* about it, and to ask myself the question which I should have to answer if I were in the jury box, is this dishonest, or is it gross want of care? And having done so, I have answered the question, feeling that fraud ought to be brought home before you act upon it—I do not mean brought home as if it were a question being tried at the *Old Bailey*—but brought home in this sense, that one ought not to find fraud against a man, which is a serious and grave thing, unless one is perfectly clear and ready to act upon one's opinion in a matter which affects others so greatly. I answer the question in this case in favour of the Defendants one and all; I do not think they or any of them were dishonest, but they ought not to have the costs in this action, for I think they have used language which was grossly misleading, and which has naturally brought about this litigation. It is their good fortune that the law of *England*, as the House of Lords has laid it down, does not make it a legal duty to be careful; but they ought not to get costs, because it seems to me that their conduct was carelessness of such a character as not only to mislead people with whom they were dealing—that is not the point—but also not unnaturally to appear to the Plaintiffs to have been fraudulent. I believe that people who were dealing with them, when they found out these reports had not been prepared for the directors, in the sense of being prepared by the instructions of the directors, might reasonably say that these men must be dishonest. I do not mean that persons would say so who, like English Judges, are in the habit of weighing carefully the considerations which ought to prevail in the discussion of liability for fraud. The Defendants have, therefore, the benefit of a tribunal which is perhaps more careful than the ordinary people with whom they are dealing; but they appear to me to have brought about this

action by their own misconduct, and they ought not to have their costs. As to the materiality of the misrepresentation I will say nothing. It is a difficult point.

KAY, L.J.:—

We are all quite agreed in the decision of this case; and if I add a few words it is more out of respect to the learned Judge in the Court below from whom we differ than from any other reason.

I wish to observe that the speech of Lord *Herschell* in the House of Lords, in *Peek* v. *Derry* (1) had been read by two, at least, of the noble lords who assisted in the decision of that case before he delivered it, and Lord *Watson*, who was one of those who had read it, says that he accepts without reservation the opinion which Lord *Herschell* was about to deliver. Lord *Watson* also said he had had the opportunity of reading it, and desired to add nothing to the extremely lucid treatment of the authorities contained in it.

The actual decision in *Peek* v. *Derry* was this: By a special Act a tramway company in which the defendant had taken shares was authorized to make certain tramways, and by one of the sections of that Act the carriages to be used on the tramways might be moved by animal power, and, with the consent of the Board of Trade, by steam or other mechanical power. The prospectus was found to contain this statement: "One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses." In fact, the consent of the *Board of Trade* had not then been obtained, and it was afterwards refused; but Lord *Bramwell* says that the learned Judge in the Court of First Instance in that case held as he did, that the directors or the persons who issued that prospectus thought that the company had the right, as put in the prospectus, to use steam. And again, in others of the speeches delivered in that case, it was stated that the learned Judge in the Court of First Instance had found that the statement had been honestly made, believing it to be true; and the Court of Appeal held

(1) 14 App. Cas. 337.

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that, nevertheless, it must be treated as fraudulent because the directors had no reasonable ground for that belief. And the question of whether a statement, honestly made and believed to be true, would nevertheless be treated as fraudulent because those who made it had no reasonable ground for the belief which they said they had, was the main question discussed by the noble Lords, in the speeches they made. I will not read again those passages which have been read by Lord Justice *Lindley*, but I wish also to observe this, that the case of *Peek* v. *Derry* (1) was argued some time before the judgment of the Court of Appeal in *Arnison* v. *Smith* (2) was delivered, and the Lord Chancellor, who was one of the noble Lords before whom *Peek* v. *Derry* was argued, was also one of the Judges in the case of *Arnison* v. *Smith*, and he, after having heard the arguments in *Peek* v. *Derry*, made this observation in *Arnison* v. *Smith*: "A deliberate statement was made, and the defendants cannot be heard to say that they did not know the popular meaning of the words they used. If they had said, 'We did not know what was in the prospectus, and hastily put our names to it without reading it,' the case would be open to different considerations." Therefore, it was quite present to his Lordship's mind, and he seems to have concurred with Lord *Herschell's* speech upon the general doctrine that making a false statement by mere carelessness does not necessarily amount to fraud. The carelessness must come up to that which was described in Lord *Herschell's* speech, and in many other judgments before, as recklessness; that is, according to the definition given in this speech, an indifference in the mind of the man who makes the statement whether the statement was true or false, without knowing whether it was true or false, and without caring.

Now, the real question in this case is one which has involved the Court of Appeal—at least, speaking for myself, has involved me—in very considerable difficulty indeed. The learned Judge before whom this case was argued does not seem to have had the speeches of the learned Lords in the House of Lords in *Peek* v. *Derry* (3) brought to his attention very carefully, if, indeed, at all. The distinction between a statement which was not true, made

(1) 14 App. Cas. 337. (2) 41 Ch. D. 348, 368. (3) 14 App. Cas. 348.

carelessly, and a statement which was not true, made fraudulently, does not seem to have been pressed upon him. I have read his judgment more than once with attention, and I do not find that that distinction was present to the mind of the learned Judge when he gave the judgment in the present case. There is no finding, as has been pointed out, that this statement, if untrue, was made fraudulently. There is no distinct finding of that kind. There is no finding that in making the statement the directors acted dishonestly. There is no finding, as it is termed, in Lord *Halsbury's* speech in the House of Lords, of the existence of the *mens rea* in all or any of these Defendants. Therefore the findings of the learned Judge certainly do not amount to such a decision as would justify the maintenance of the judgment against them for deceit, according to the doctrine laid down in *Peek* v. *Derry* (1).

Then, of course, that puts this Court in this very great difficulty. The learned Judge has not in so many words found fraud, but he has found they were liable, and that may or may not have involved a finding that they had acted fraudulently. Then, again, that depends on what, in the judgment of the learned Judge, amounted to fraud in such a case, and if he adopted the decision of the Court of Appeal in *Peek* v. *Derry* (2) that the making of a statement of this kind, believing it to be true, although there was no reasonable ground for such belief, would amount to fraud, that was a doctrine which was unhesitatingly overruled in the House of Lords' decision in that very case. Accordingly, we are driven, not having the witnesses before us, to go through the evidence, and try to make out, if we can, whether this statement in question was, or was not, dishonestly made by the Defendants. I cannot help saying that it impressed my mind very much that the statement, to a person who read the prospectus with care, for the purpose of determining whether he should take shares in the company or not, would or might have the meaning that the directors of this company had obtained these reports for their own information, they being in the position of the purchasers of the property in question, which was a mine. I think it is quite possible, and, indeed, most probable, that any careful intending shareholder reading this prospectus would

(1) 14 App. Cas. 337. (2) 37 Ch. D. 541.

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attribute that meaning to these words; and if that were so, no doubt that is a very different thing from what was actually the fact, namely, that the reports had been made before any directors were consulted at all, and had been made on the instructions, not of any director, but of the agents in *England* of the vendors of the mine; in short, that the reports had been made for or on behalf of the vendors, rather than for or on behalf of the purchasers. That is unquestionably a serious misstatement, and I agree that it is the *primâ facie* meaning of those words, if read by a careful man who was considering whether he should take shares in the company or not.

But then I should think it quite possible, and I cannot find anything in this evidence which convinces me to the contrary, that the persons who made this statement either did not attribute that meaning to the words, or did not clearly see that an intending shareholder who read that prospectus would attribute that meaning to them. I quite believe, and I think it is the fair result of the evidence, that the importance of the words was not present to the mind of any one of these directors. You may say that it is the grossest possible carelessness that it should be so. I quite agree; I think it is. I think they ought to have examined the words very carefully indeed, and that they were guilty of very gross negligence in allowing such words to go forth to the public when the fact was not literally as described by those words. But I am not convinced that we ought to say, upon such evidence as was given in this case, that any one of these directors in issuing that prospectus to the public had a dishonest purpose, that his mind was in the attitude or condition of what is described as *mens rea*—in short that he was guilty of fraud, and although it appears to be involved in the finding of the learned Judge in the Court below that these Defendants were guilty of fraud, we are not aware of the mode in which he arrived at that; and, looking at the evidence, after canvassing it with considerable care, I am not satisfied that this evidence does prove such a condition of mental dishonesty on the part of the Defendants as would be necessary to support an action of deceit against them, according to the decision of *Peek* v. *Derry* (1).

(1) 14 App. Cas. 337.

On this, the main point of the case, I have very imperfectly expressed my own view, as I say, rather out of respect to the learned Judge than because I have anything material to add to what the other members of the Court of Appeal have said in this case, but I am also struck, and I think more forcibly than the other members of the Court of Appeal, with the question of materiality. There is no proof whatever that the reports mentioned in this prospectus are, or that any one of them is untrue, or exaggerated or inaccurate in any respect. The statement of claim alleges that the estimates formed by one of the persons who made the reports, *Del Mar*, were grossly exaggerated, and I think that is the only statement made in the statement of claim as to the untruth of these reports. But assuming it to be sufficiently raised by the statement of claim, there is no proof and no attempt at proof that the reports were in fact untrue. It seems to me that it is impossible for any Court to assume anything to assist a plaintiff to make out his case of fraud. Every step—every material step in the evidence which makes out a case of fraud, it is incumbent on the plaintiff who alleges fraud to prove by sufficient evidence. If it is a necessary part of his case to make out that the reports were untrue, then all I can say is, there is not only no proof of that, but there is no evidence of it. It was said, "Oh, yes; but there is some evidence of it, because, if the reports had been true, if the mine had been such a rich mine, the probability is the shares would not have gone down." But as Lord Justice *Lindley* has said, we have had the balance sheet handed up to us, and it was quite plain from the balance sheet that there was another and very sufficient reason why the shares had depreciated, without assuming the reports to be untrue, for it appears quite clearly from that balance sheet that after paying out of the capital which was raised, the price which had to be paid for the mine, and after paying other incidental expenses there was not left—and there is evidence to assist this part of the case—sufficient capital properly to develop and work this mine; and that would by itself be, and probably was, a sufficient reason, and for anything I know, and as far as appears from the evidence, was the only reason why the mine was not properly developed, and the shares were considerably depreciated.

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Now I should like to put, in order to illustrate my own view of this case, what seems to me a parallel case. Supposing a person was selling a real estate, and he represented that he had been assured by *A. B.* (I assume *A. B.* to be a well known mining engineer, a man whose assurance would carry very great weight) that there existed beneath that estate a particular seam of coal which was known in the neighbourhood, and was of great value, and it turned out afterwards that he had not had any such assurance from that individual at all, but that the mine was there. Could an action of deceit be maintained in that case? Could the plaintiff come into Court and say: "I admit the mine is there. I admit the estate is quite as valuable in that respect as it was represented to be; but I was told that it was said by *A. B.* that the mine was there, and I relied very much on that, and *A. B.* did not say it." Well, I will not give any definite opinion on the subject, but it seems to my mind that that would be a thing that ought to be very carefully considered in determining whether the statement that *A. B.* had given that assurance was material or not for the purpose of an action of deceit. You may easily put many cases of the same kind. I will content myself with that as an illustration of what I mean. Now if the falsehood or exaggeration of these reports is not made out at all, as it certainly is not made out here, I cannot see that this statement would necessarily be a material one. To treat this case in the way I have just treated the case I put by way of illustration, suppose the Plaintiff had come here and said: "I admit that all these reports are perfectly true, that they are not in any degree exaggerated; there is nothing in them of which I could at all complain; but I say they were not made for the directors, they were made for somebody else." Could he succeed in an action of deceit? I doubt it very much, and therefore I am not satisfied that in this case the statement is proved to be sufficiently material. Again, that goes to another point on which I do not profess to give any decided opinion. It is well established, as Lord *Halsbury* says in *Peek* v. *Derry* (1), that in dealing with actions of this character, fraud without damage, or damage without fraud, does not give rise to such an action, and

(1) 14 App. Cas. 337.

certainly the considerations I last alluded to must have some weight in determining whether this misstatement has caused damage. I can quite conceive it might, by way of argument, be put in this way. It might be said: "True, I do not prove these reports to be false. I cannot ask that it should be assumed in my favour that they are false; but I took my shares in this company on the faith of this statement that they were made for the directors, and damage has resulted to me from that statement, although perhaps not from the falsehood of the reports. I should not have taken the shares at all if it had not been for this statement, and having taken the shares now, those shares have gone down in value, and damage has resulted to me, and therefore I have a right to maintain an action of deceit."

I am not quite convinced in my own mind at present, and I will not give any decided opinion upon it, that this is a damage which results directly from the false statement. If the reports were true, and the only falsehood or the only inaccuracy of the statement was that they were made for the directors instead of being made for the promoters, for whom they were actually made, I am not quite sure that such damage would result sufficiently from the false statement to enable him to maintain his action of deceit. However, as I say, I merely express this as a doubt existing in my mind. I do not wish to give any decided opinion upon it.

For the reasons I have given, I agree with the other Lords Justices, and I also agree on the question of costs. It seems to me that although fraud is not made out to our satisfaction, there was an amount of carelessness so gross as almost to invite an action of this kind, and although the Defendants have escaped, they have escaped in such a way that we ought not to say they are entitled to have any of their costs of this action.

Solicitors for the Plaintiff: *Burton, Yeates, Hart & Burton,* agents for *Tyrer, Kenion, Tyrer & Simpson, Liverpool.*

Solicitors for the Defendants: *Kerly, Son, & Verden.*

M. W.

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Jan. 26, 27; *Feb.* 2.
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April 20, 21.

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[1889 L. 2195.]

Will—Bequest of Shares in a Partnership Business—Satisfaction of Legacy—Purchaser for Value—Double Portions.

A testator by his will gave his shares in a partnership business to his three sons equally as tenants in common. At the date of his will he had twenty-one twenty-fourth shares in the business, and *E.*, one of his said sons, was employed in the business as a manager, at a salary; the other two sons were not employed in the business. Subsequently, *E.* pressed for an increase of his salary, and eventually the testator arranged a new deed of partnership under which *E.* was admitted a partner, the testator making over to him two of his twenty-one shares, and *E.* accepted the position and relinquished his salary as manager, but received instead his proportion of the profits as a partner, which was greater in amount.

On the death of the testator, *E.* claimed to be a purchaser for value of his two shares in the partnership, and to be entitled to shares equally with his brothers in the remaining nineteen shares of the testator:—

Held, that, assuming that the two shares which *E.* received in the testator's lifetime were given him by way of portion, the presumption against double portions was rebutted by the circumstances under which he received them, which showed that the testator intended him to have a greater share in the business than his brothers.

But, *semble*, the two shares were not intended as a portion, but as remuneration for his services as manager.

The decision of *Romer*, J., reversed.

SIR *EDMUND LACON*, by his will dated the 22nd of December, 1884, bequeathed his banking business and other property to his eldest son *Edmund Lacon*, and devised and bequeathed all his parts, shares, estate and interest of, and in the trade or business of a brewer, then carried on by him in *Great Yarmouth*, and in the *City of London*, and elsewhere, in co-partnership under the style of "Sir *Edmund Lacon & Sons, The Great Yarmouth Brewery*," and of and in all messuages, tenements, beer-houses, public-houses, buildings, lands, and other hereditaments of every tenure, whereon the said trade or business should at the time of his death be carried on, or which should then belong to the said partnership (with certain exceptions), and of and in all the

engines, machinery, fixtures, and all other effects and things which at the time of his death should be used in the said business, and of and in the goodwill and the book-debts, unto his sons the Plaintiff *T. B. Lacon*, and the Defendants *H. S. Lacon* and *Ernest de M. Lacon*, to and for their own use and benefit respectively in equal shares as tenants in common. The will contained a residuary bequest to all the six children of the testator, being four sons and two daughters, equally, each share of residue being settled, and the Plaintiff *T. B. Lacon*, and the Defendants *Ernest de M. Lacon* and *E. P. Youell*, were appointed the executors of the will.

At the date of his will the testator held twenty-one twenty-fourth shares in the brewery business, his partners being Admiral *Willes*, who held two twenty-fourth shares, and *S. Nightingale* who held the remaining one twenty-fourth share.

From 1874, the Defendant *Ernest de M. Lacon*, who was the testator's youngest son, was employed in the business at a salary, and in the year 1884, he became the *London* manager at a salary of £1000 per annum. Shortly afterwards he applied to the testator for an increase of salary, in consequence of the growing business of the brewery adding to his duties and responsibilities. The testator made no reply at first, but in 1886, *S. Nightingale* having died, the testator arranged a new deed of partnership and introduced the Defendant *Ernest de M. Lacon* as a partner, and gave him two of his twenty-one twenty-fourth shares; the other partners being the testator (who held nineteen shares), the said Admiral *Willes* (who held two shares), and a Mr. *Nightingale*, a nephew of the deceased *S. Nightingale*, who held one share. The Defendant *Ernest de M. Lacon* accepted the position, relinquished his position and salary as manager, and signed the new deed of partnership, and, at his father's request, refunded to the partnership the salary which he had received as manager from the 30th of September, 1886, to the 30th of September, 1887. From this time, as an active partner, he managed the *London* branch of the business. The new deed of partnership, which was dated the 19th of December, 1887, contained a recital that Sir *Edmund Lacon* had assigned or made over two of his twenty-one shares to the Defendant *Ernest de*

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M. Lacon, which were stated to be of the value of £21,500. It was provided by the articles that *Ernest de M. Lacon* should attend to the business and devote his whole time to it. The 28th clause provided that, if any partner should die during the continuance of the partnership, his executors, administrators or legatees should be at liberty within four months to give notice in writing of their intention to discontinue the partnership; and if the executors, administrators or legatees of a deceased partner should desire to continue in the partnership or should not give notice to discontinue, they should be and be considered as partners, and be admitted into the partnership in the place of the deceased partner, and in respect of his share and interest therein upon the terms of the partnership deed so far as the same should be applicable to the altered circumstances then existing, and so that the new partners or partner admitted under this clause should have all the rights and powers of the deceased partner in whose place they or he should be substituted (save and except that they or he should not be acting partners or partner without the consent of the other partners or partner); and the share and interest of the deceased partner and the share of profits coming to such new partners (if more than one) should be divided amongst such new partners in such shares and proportions as they might be entitled thereto, or might mutually agree upon." Then there was a proviso that "every partner admitted under this clause shall execute a deed covenanting with the other partners or partner for the time being jointly and separately to perform and observe the provisions of these presents so far as the same shall be applicable." And there was a further proviso that if the surviving partners or partner refuse to admit into partnership as acting partners or partner the executors, administrators or legatees of the deceased partner claiming admission under this clause, then the said executors, administrators or legatees should have the option, to be exercised in manner hereinafter mentioned, within two calendar months after such refusal, of purchasing the shares and interest of the surviving partners or partner in the capital and assets (including the goodwill of the partnership). No assignment of the shares was actually executed, but the Defendant *Ernest de M. Lacon* was

credited in the partnership books with two twenty-fourth shares, and received a proportionate share of the profits. This proportion largely exceeded his former salary.

Sir *Edmund Lacon* died in 1888, and his said will was duly proved by the executors therein named. A question then arose as to the effect of the above transactions on the bequest of the brewery shares contained in the will.

The Plaintiff by his statement of claim sought a declaration that the gift in the will to the Defendant *Ernest de M. Lacon* of a share in the business was adeemed to the extent of the two shares which he took under the new partnership deed, that he must bring the two shares into hotchpot with the other nineteen shares, and that he, the Plaintiff, and the Defendants *H. S. Lacon* and *Ernest de M. Lacon,* were respectively entitled to seven twenty-fourth shares.

The Defendant, *Ernest de M. Lacon,* by his statement of defence contended that he was a purchaser for value from the testator of the two shares in question, and that, in respect thereof, no provision made for him by the will was adeemed or satisfied *pro tanto,* or in any way affected; and that, on the construction of the will, he was entitled to one equal third of the nineteen shares held by the testator at his death.

The action came on for hearing before Mr. Justice *Romer* on the 26th of January, 1891.

Sir *H. Davey,* Q.C., and *Borthwick,* for the Plaintiff:—

The general principle of satisfaction applies to shares in a partnership business: *In re Lawes* (1); *In re Vickers* (2). There is no evidence of a bargain between the father and the son with respect to these two shares, and the mere fact that his position and salary as *London* manager ceased on his becoming a partner did not make him a purchaser for value of them. They were a gift or present to him, and the recital in the new partnership deed supports that view. The gift of these two shares therefore is an ademption *pro tanto* of the gift in will, and the presumption against double portions arises, and the two shares must be brought into hotchpot.

(1) 20 Ch. D. 81. (2) 37 Ch. D. 525.

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Rigby, Q.C., *Neville*, Q.C., and *Begg*, for the Defendant, *Ernest de M. Lacon*:—

The doctrine of double portions only applies where there is a gift of a sum of money or money's worth; that is, some property the value of which has been fixed by the testator himself. Here only the nineteen shares which the testator had at the time of his death passed by the will. The two shares were acquired by the son under a business transaction in which he was a purchaser for value by giving up his salary and becoming a managing partner, and the question of ademption does not arise. But if it does arise, it only applies to the gift of residue in which all the testator's children are interested.

Haldane, Q.C., and *P. S. Gregory*, for the Defendant *H. S. Lacon*.

E. S. Ford, for the Defendant, *E. P. Youell*.

Sir *H. Davey*, in reply:—

A portion is not restricted to a gift of money or money's worth; it is anything which a person in *loco parentis* allots as a provision in discharge of his obligation to support: *Taylor* v. *Taylor* (1); and real estate can be made the subject of portions: *Pym* v. *Lockyer* (2); *Weall* v. *Rice* (3); *Thynne* v. *Earl of Glengall* (4); *Russell* v. *St. Aubyn* (5).

Feb. 2. ROMER, J.:—

The first point I have to consider in determining this case is whether the Defendant, *Ernest Lacon*, became a purchaser of the two twenty-fourth shares, or whether he is to be considered as receiving a gift of these shares from his father. In my judgment he was not a purchaser. Shortly stated, he acquired them under these circumstances: Prior to December, 1887, he had acted as manager of the *London* branch of the business, with a salary of £1000 per annum, and was pressing for an increase of salary.

(1) Law Rep. 20 Eq. 155.
(2) 5 My. & Cr. 29.
(3) 2 Russ. & My. 251, 267.
(4) 2 H. L. C. 131.
(5) 2 Ch. D. 398.

His father, who was a reticent man, made no answer to this demand; but in 1887, on a reconstitution of the partnership, he introduced his son *Ernest* as a partner, and gave him these two shares. At first the father appears to have contemplated giving him only one share, but finally he gave him two shares. After the father had decided upon this, and in settling the new partnership deed as between the various partners, the question was suggested to the father by one of the other partners whether the son *Ernest*, after becoming a partner, would draw a salary for his services in addition to his share of profits as a partner, and the father answered, "No," and so the partnership deed was drawn and executed. There was no bargaining of any sort between the father and son. The two shares in the goodwill and capital so obtained by the son were very valuable. The son, as of course, accepted the shares and position of partner. His share of profits as partner largely exceeded the £1000 a year remuneration he formerly received. The matter ought to be regarded as a matter of substance, and, so regarded, it is clear that this was a gift, and a very valuable gift, to the son, and not the less so because, by becoming a partner, he ceased to be a servant in the business, and had to perform the active duties of a partner, and in that capacity managed the *London* branch. But then it is said that, admitting this to be a gift, yet, to come within the law regarding the ademption and satisfaction of portion, a gift must be of money or of some property, the monetary value of which had been pointed out or fixed by the donor. In my judgment this contention cannot be supported. I know of no principle on which a distinction can be drawn for the purpose of considering what is a portion between a gift of money and a gift of any other kind of property, and I know of no authority supporting the contention. On the contrary, the cases shew that gifts of shares of residue, of shares in partnership property, and of real estate, have been considered and treated as portions. This being so, as the gift of the two twenty-fourth shares is, in my judgment, a portion, and the gift by the will to the son *Ernest* of the one-third part of the father's shares and interest in the business is also a portion, the presumption against double portions arises. This presumption, unless rebutted, compels *Ernest*, as between himself and his

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two brothers, who are entitled under the will to the shares and interests of which the father died possessed, to treat the two twenty-fourth shares as an ademption of his one-third part, or, in other words (as the father left nineteen twenty-fourth shares), it entitled each of the two brothers to seven twenty-fourth shares instead of one-third of nineteen twenty-fourth shares. Is the presumption rebutted in this case? I think not. The two gifts to the son *Ernest* are *ejusdem generis*. The only difference suggested as rebutting the presumption is that, in respect of the two shares acquired under the partnership deed, *Ernest* is an active partner, and in respect of the shares passing by the will, the legatees are sleeping partners, unless it is otherwise arranged between them and the other partners. But, so far as property is concerned, the shares are alike. And, even treating the terms as to the partnership as annexed to and part of the shares, is the difference sufficient to rebut the presumption? I think not. Numerous cases have pointed out that the presumption will not be rebutted by slight differences either between the subject-matter of the two gifts or between the trusts or modes of application of the gifts. Looking at the case before me as a matter of substance, I think the natures of the gifts are not so different as to rebut the presumption. So far as concerns being an active instead of a sleeping partner in respect of shares, I cannot see that that materially affects the value of the shares. Some persons might prefer having active duties to perform, and in this case the Plaintiff desired to be an active partner, but the Defendant *Ernest* refused to allow him to be such on the ground that, in *Ernest's* opinion, he was not fitted for the duties. There certainly was no evidence, and there is no presumption on which I can act, that *Ernest's* two twenty-fourth shares were in any substantial sense less or more valuable because he was an active partner in respect of them. But then it is said that, inasmuch as all the children of the father shared under his will, in the residue, if ademption there be of *Ernest's* portions under the will, it should be of his share of residue. I cannot follow this. The presumption as to ademption being intended is rebutted, as between the two shares and the residue, by the incongruity of the gifts, and the fact that the two shares never could, under the

will, have been part of the residue. As between the gifts of the two shares by the partnership deed and of the shares generally by the will there is no such rebuttal. Lastly, it was urged as against the Plaintiff's contention, that, inasmuch as the gift by the will was in effect only of such shares as the father should die possessed of, and the father parted with the two shares in his lifetime, these two shares did not pass by the will, and there could be no ademption of them. The answer to this argument is, that the question is not what passed by the will, but whether the presumption against double portions has arisen? In all the cases of ademption of a share of residue by a gift to the child subsequent to the date of the will, the gift never could be part of the residue passing by the will, so that if the argument had been found, these cases must have been wrongly decided. It results that my judgment must be for the Plaintiff. Like other Judges in some similar cases I, in this case, may doubt whether the effect of the application of the rule of presumption against double portions is to carry out the intention of the testator, but I am not at liberty to act upon any such doubt. The Plaintiff, therefore, is entitled to the declaration for which he asks.

H. L. F.

From this judgment the Defendant *Ernest de M. Lacon* appealed. The appeal was heard on the 20th of April, 1891.

Rigby, Q.C., *Neville*, Q.C., and *Begg*, for the Appellant:—

There is no case in which the presumption against double portions has been held to have arisen under circumstances similar to those in this case. A "portion" implies bounty, and the primary idea of the doctrine against double portions is that bounty adeems bounty; but when the element of consideration is introduced the foundation of the doctrine disappears. Here, the two shares were not given to the Appellant as a son, but as an efficient manager of the business, and to secure his services in that capacity.

This is not bounty, it is remuneration; he was a purchaser for value, and the doctrine does not apply.

[BOWEN, L.J.:—Has the doctrine ever been applied to a case where services were to be rendered or consideration given?]

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There is no such case exactly. The nearest case is *In re Lawes* (1). But there the testator had himself put a monetary value on his gift. The doctrine in fact only applies to gifts of money portions or pecuniary benefits, or gifts of property upon which the donor has himself put a money value; such a case for instance as *Bengough* v. *Walker* (2); and it has been applied to gifts of residue, because residue is a congeries of things in the nature of money which have to be reduced to a money standard. But it has never been applied to land: *Davys* v. *Boucher* (3); *Backwell* v. *Child* (4); or to specific gifts of property on which the donor has not himself put a money value. The doctrine has moreover been treated with disfavour, and there is no tendency to extend it.

[LINDLEY, L.J.:—We should not perhaps invent it in these days, but we have inherited it.]

In this case the presumption has been carried to an extent to which it has never before gone, and the more the circumstances are looked at, the more impossible it seems to regard this purchase or gift for services rendered by the manager of a fluctuating business, to whose exertions its success has been largely owing, as a double portion "to fulfil the same antecedent obligation or duty": *In re Pollock* (5), which must be brought into hotchpot by the manager in favour of the sleeping partners.

[They also referred to *Ex parte Pye* (6); *Roome* v. *Roome* (7); *Roper* on Legacies (8).]

Sir *H. Davey*, Q.C., and *Borthwick*, for the Plaintiff:—

The two questions here are (1.) was there a gift of the two shares in question, and (2.), was that gift a portion? The contention that it was a purchase and not a gift is entirely displaced by the evidence, which shews that there was no bargain whatever between the testator and his son *Ernest*. A portion is a permanent provision which a person *in loco parentis* makes to a child or other person in a corresponding position: *Taylor*

(1) 20 Ch. D. 81.
(2) 15 Ves. 507.
(3) 3 Y. & C. Ex. 397, 411.
(4) Amb. 260.
(5) 28 Ch. D. 552, 556.
(6) 18 Ves. 140.
(7) 3 Atk. 181.
(8) Chap. VI. p. 1.

v. *Taylor* (1). And it is difficult to see why a gift of shares in a valuable and well-established trading concern, with the necessary capital attached to them, is not a portion. The rule was founded on this, that at the time when the father makes his will he is presumed to have made a scheme for the distribution of his property amongst his children; and if he afterwards makes a gift to a child by way of portion in his lifetime, it is assumed to be in anticipation of the scheme so laid down, and is to be taken in part performance of that scheme, and not for the purpose of disturbing or altering it. We contend that part of *Ernest's* portion has been given in anticipation, and must be brought into hotchpot.

[BOWEN, L.J.:—If it was supposed that the intention of the person *in loco parentis* was formed at the time he made his will, did not the provision in the *Wills Act*, which makes the will speak from the death of the testator, affect the presumption?]

Under the *Wills Act*, for the purpose of construing the will and ascertaining what passes under it, it is to be read as if it bore date immediately before the death of the testator; but for many purposes the date of the will must still be looked at, and the date must remain unaltered. The presumption remains unaltered, because the ademption is outside the will; and the mere fact that the son became an active partner, with all the rights, duties, and privileges of a partner, is not enough to rebut the presumption.

[They also used the arguments, and cited the authorities reported in the Court below, and, in addition, referred to *Montefiore* v. *Guedalla* (2); *In re Tussaud's Estate* (3); *Lord Chichester* v. *Coventry* (4); and *Schofield* v. *Heap* (5).]

Haldane, Q.C., and *P. S. Gregory* for the Defendant, *H. S. Lacon.*

E. S. Ford, for the Defendant *E. P. Youell.*

Rigby, in reply.

(1) Law Rep. 20 Eq. 155.
(2) 1 D. F. & J. 93.
(3) 9 Ch. D. 363.
(4) Law Rep. 2 H. L. 71.
(5) 27 Beav. 93.

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LINDLEY, L.J.:—

The question in this case is one of importance as well as of difficulty. It is in form an appeal from a decision of Mr. Justice *Romer*, making a declaration to the effect that certain shares in a brewery, to which I will refer presently, are divisible in sevenths, whereas the Appellant, Mr. *Ernest Lacon*, contends that he is entitled to eight and a third shares, and each of his brothers to six and a third.

The point depends upon what is called the presumption against double portions; and before going into the facts, I may state at once, from the judgment of Lord *Eldon* in *Ex parte Pye* (1), what the doctrine is. He says this: "Without going through all the cases, that were cited, and those referred to in them, having compared the case in *Atkyns* with manuscript notes of that case, and looked into some other cases, one in *Ambler* and some earlier, I may state as the unquestionable doctrine of the Court, that, where a parent gives a legacy to a child, not stating the purpose, with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion, that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part;" and then he goes on to say what has been done in some of the cases.

Now, what we have to consider are—first of all, the will of the late Sir *Edmund Lacon*, and, secondly, some partnership articles which were entered into by him after the date of his will, and the circumstances under which those articles were entered into; and what we have to see is, first of all whether this is a case in which there are two portions, and, secondly, assuming that there are two portions, and assuming therefore that the presumption to which I have referred arises, whether there are or are not circumstances in this case which rebut that presumption.

The will is plain enough. The testator had four sons and

(1) 18 Ves. 151.

two daughters. He had two businesses. He had a banking business at *Norwich* and at *Yarmouth*, and he had a brewery business at *Yarmouth*. He leaves his banking business and other property to his eldest son, the present baronet, of whom we need say nothing more, and then he leaves his brewery business, in which he had twenty-one out of twenty-four shares, to his younger children, *Thomas, Henry,* and *Ernest.* He then, after making various bequests in favour of his daughters, bequeaths the residue of his property amongst all his children. That is the general scheme of the will. To use Lord *Eldon's* language in *Ex parte Pye* (1), there is nothing in the will which enables us to state the purpose for which these brewery shares were given to the three sons.

In 1884 the position of affairs was, in addition to what I have already stated, this, that the fourth son, *Ernest*, was then being brought up to the brewery business, with a view ultimately, no doubt, of becoming a partner in it. The same observation is not true of the eldest son. It is not true of the two intermediate sons. It was the youngest son and the youngest son alone who was brought up to this business. Having, I suppose, become useful, he was paid a salary of £500 a year, and, afterwards he was paid a salary of £1000 a year, which he was receiving in 1887. In that year it was considered desirable that some modifications should be made in the partnership in the brewery business. It was necessary to make modifications as regards the share of Mr. *Nightingale*, one of the partners, and it appears from the evidence that the son *Ernest* had been urging his father to increase his salary. That salary was not paid by the father, but by the firm, though of course the father, having so large a share in it, was the principal paymaster. It seems, from the evidence which has been given by Mr. *Ernest Lacon* and Mr. *Waters*, that there was a discussion—if it may be called a discussion, because the father was a very reticent man and did not say much, but he listened to the statements made by *Ernest*; and he so far acquiesced that upon one occasion when *Ernest* was pressing him for an increase of the allowance, he said, "Oh, I have made you a partner," and the evidence of

(1) 18 Ves. 151.

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Mr. *Waters*, the solicitor, tends to shew, I think conclusively, that what the father was doing, amongst other things—I do not say the whole of what he was doing, because that is begging the question—unquestionably was to increase the allowance to his son *Ernest*. That was part of his object. Mr. *Waters* tells us that he thought at one time he would do that sufficiently by giving him one share, and then he changed his mind and told Mr. *Waters* he would give *Ernest* two shares. Then there was a question as to what the effect of that would be upon the allowance. That question arose by reason of a query put into the draft by Mr. *Nightingale's* solicitor, as to Mr. *Nightingale's* allowance. The matter as to Mr. *Ernest Lacon's* allowance was brought to the father's attention, and he said at once, "The allowance will have to be given up. The shares are in substitution of that;" and so it came about that, in 1887, Mr. *Ernest Lacon* ceased to be a salaried clerk or assistant, or whatever he was in the concern, and became a partner in respect of two twenty-fourth shares, which of course were given him by his father. They were not contributed by the other partners, but they came out of the father's twenty-one twenty-fourth shares.

The partnership articles recite this arrangement in this way. They recite the fact that the father has assigned or made over to his son *Ernest* two of his twenty-one shares in the partnership assets and property, and then they recite an agreement that a partnership should be constituted between the parties thereto; and then state the value of the two shares given to *Ernest* at the sum of £21,500. That is taken as a capital sum, the sum I suppose at which they are to be taken in the books. Then we have the usual partnership articles, between the partners, and the person who is taken in is to be bound to attend to the business and devote his whole time to it. Then there is nothing of any importance till we come to the 28th clause. That clause is addressed to the introduction by the father of his sons or legatees as partners under his will.

[His Lordship read the clause as stated above, and proceeded:—]

Now, what is the effect of that? The effect of that, as I under-

stand, is, that it was competent for the testator to bequeath his shares to anybody he liked—to sons or to anybody else—and that the legatees should thereupon be at liberty to become partners, and if they became partners they would be bound to attend to the business, unless the survivors said that they should not. It is not, as I first thought, that these legatees could become partners and escape the duty and burden of working as acting partners. The option of working or not working would not be on them, but on the survivors, and that is important with reference to a discussion which took place yesterday, and it displaces the force of the observation which fell from me, and, I think, from the Bench generally, that it would be reasonable to give Mr. *Ernest Lacon* two extra shares in consideration of his doing work, considering that his brothers did nothing. However, the position certainly is this, that it does give him rights under this deed as a partner admitted under the deed which he would not have, and which his brothers would not have, if they were claiming simply under the will.

Shortly after this the testator died without having altered his will. Now, upon the will and the deed Mr. *Ernest Lacon's* position is unassailable. He has got two shares under the deed. He has got under the will one-third of all the remaining shares of his father. As a matter of construction, there is no difficulty about it and no controversy about it.

But then comes in the presumption against double portions, and his brothers say: "By reason of the presumption against double portions you must treat the two shares which our father gave you in 1887 as given you in anticipation of and on account of and in part satisfaction of the seven shares which you would have taken and which we should all have taken if no provision had been made for you." That rests upon the presumption.

Now, upon the question whether these two provisions—the one by the will and the other by the deed—are portions, it appears to me that there is very considerable difficulty in saying that they are not. Certainly, the purpose for which a provision is given is important, as appears from the language of Lord *Eldon* himself. I think that what the learned lord said about "purpose," in considering the nature of a provision by will, is a point reasonably

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applicable to a provision made either by a deed, instrument, or will. But assuming that these two provisions are both portions —and, having regard, as I have said, to the language of the cases upon this subject, and especially of the late Master of the Rolls in *Taylor* v. *Taylor* (1), I shall assume that they are portions—the question still arises whether there is or is not, under the circumstances of this case, enough to rebut the presumption that these shares are to be taken as given on account of and in anticipation of and in part satisfaction of what otherwise would have been taken under the will if they had not been given by the testator in his lifetime. Now, here we differ from Mr. Justice *Romer*. The circumstances of this case are peculiar; and we think that there are circumstances sufficient to indicate an intention on the part of the father, not simply to anticipate as to one son the provision which he had made for all his sons, but an intention and desire to prefer that one son to the others, not only in point of time, but in point of the amount and nature of the provision which he was making. It is, to my mind, very significant that this son alone had been brought up in the business. It is, to my mind, very significant that this provision was made for that son when he was asking for a further advance of salary, and, as Mr. *Waters'* evidence and his own evidence (though, of course, that must be taken as interested evidence) goes to shew, it was one method of increasing his allowance. It was not simply giving him now what he would have when his father died. I do not say it was not that, but it was that and a great deal more; and when we consider that it was to the advantage of the family that one son, at all events, should be brought up in the business and be there when his father died as a partner, it appears to me that there is amply enough for us to say, under these circumstances, that the presumption (which is not a very strong one) is rebutted, and that, looking at what was done in 1887, and the reasons which brought about what was done, the purpose which the testator apparently had in his mind when he recast those partnership articles in 1887 was deliberately to prefer *Ernest*, not only in point of time, but in point of amount also.

(1) Law Rep. 20 Eq. 155.

I think, therefore, that the appeal ought to be allowed, and that, there being no controversy except this in the action, judgment ought to be given for the Appellant, both here and below.

BOWEN, L.J.:—

The question we have to decide is, whether it was the intention of the father that the two shares which were received by the Appellant during his father's lifetime should be received by him as an advancement against the shares which the Appellant was to receive under the will on the father's death. In order to establish that intention, the Respondent has invoked what is called the doctrine of double portions—a doctrine which is, no doubt, originally Judge-made, but which is established by this Court, and against which I should be the last person to endeavour to introduce any subtle or frivolous distinction.

The doctrine, so far as it applies to a case of this peculiar character, seems to me to have been made plain to the world by the judgment of Lord *Cottenham* in *Pym* v. *Lockyer* (1), which was read during the argument, and which I will read again, because it will make the few remarks which I am about to offer perhaps clearer than they otherwise would be. Lord *Cottenham* says: "A father, who makes his will, dividing his property amongst his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced from claiming the sum given by the will as well as the sum advanced."

Accordingly, in order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there

(1) 5 My. & Cr. 29, 46.

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are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have, therefore, to ask ourselves, in the first place, were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion? But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend.

This, like the former, is a presumption which may be rebutted. The circumstances may shew that a gift given during the lifetime is not intended as an advancement of the bequest. Circumstances may shew (to put it in different language) that equality was not the intention of the father. The two questions—first, whether the gifts are both given in the way of portions; and, secondly, whether it was intended by the father that the first gift should be an advancement in satisfaction of the second, may well run together, and be blended together; and, in my opinion, this is just the case in which they do. I myself am not satisfied, in the first place, that the gift of the two shares—I call it a gift, although perhaps that expression is not exactly an appropriate term—which was made by the father in his lifetime to the Appellant, was in the nature of a portion within the meaning of

the rule. To my mind the circumstances of the case displace the notion that the father here was giving them simply by way of advancement to the son. But, secondly, I think (for reasons which I will give in a moment) that here, in any view, the second presumption in favour of equality is rebutted by the circumstances of the case. The circumstances in other words shew that the gift given during the lifetime was not intended as an anticipation of the bequest.

The son had been thirteen years in the firm—at first in a subordinate position, and afterwards as the manager of the *London* business, receiving a salary of £1000 a year. He had acquired experience and he had earned confidence. He had become a person, in 1887, unquestionably of use and value to the firm. He was a person who, even if he had not been a son, might have not unreasonably dreamed that in time, and at no very distant time, he might be promoted to a share in the business of the firm. In 1887 he wished for an increase of salary, and was in such a position that he could press his desire upon his father. Doubtless he would also look to be a partner at some time or another in the house. Now a person in that position, who in the house of his father had done service, and substantial service, might well, if a favourable view was taken of his case, be rewarded with a share or shares. When he received the shares from his father, he received, perhaps, what his father would have given with much more hesitation, or which, perhaps, he would not have given at all, if the relationship of father and son had not indeed existed. Still, he receives what can hardly be characterised as mere bounty—it is bounty, but something else. It is not a pure gift, although the element of liberality enters into it. He is given, perhaps, more than he deserves; but he deserves something. It is a portion, perhaps, in one sense—that it is a provision which the father would not have made if the recipient had not been his son—but it is a portion which has in part been earned by previous services, and which is intended, of course, to be justified by services in the future. I doubt whether, under such circumstances, it would be safe to say that the two shares originally bestowed upon the son were a portion within the meaning of the rule.

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But—secondly—there is a reason here from which we may also infer that the gift of the two shares was not intended as an advancement *pro tanto* of the bequest. These shares were active shares—they were shares which actually gave the son a veto upon the introduction at a later date, the period of which was perfectly uncertain and which might be delayed for years, of his other brothers. He had a grant of power and place thus given to him of a kind wholly incommensurate with the gift which he was to receive under the will. That grant and gift to him, treating it as a grant and gift, being to my mind wholly incommensurate with the gift under the will, assumes such a character and colour as to render it impossible for us to presume with safety that the gift of the shares was intended in any way to be an advancement towards the bequest. It seems to me to be similar upon reasoning that the Courts have abstained, when there is a substantial and material difference between the gifts *inter vivos* and the gifts under the will, from treating the former as an advancement towards the latter. The doctrine of double portions must be applied faithfully wherever it is found to be equitable; but, on the other hand, it is not to be extended. The circumstances of this case convince me that the dealing between the father and the son in the year 1887 was not intended in any way by the father to be an advancement towards what the son was to receive under the will, nor as a part performance of that distribution which the will was intended by the father to make of the father's property.

Upon these grounds I agree that the judgment of the learned Judge of the Court below ought to be displaced; although, like my brother Lord Justice, I agree in thinking that this is a very delicate and difficult case, and I am not surprised that Judges should not be of one mind upon the subject.

KAY, L.J.:—

I will add a few words. The question after all is, What was the intention of the father in this case? Did he intend, when he made this gift (if it is to be called a gift) to his youngest son in his lifetime, that it should be taken as an anticipation of the provision which he, at that time, had

made by the will, which ultimately became operative on his death?

There is a rule, which has been referred to, which is a guide, where you can have no other guide, in order to find out what the intention was. The rule is this, that if there are two provisions, the one made by the will and the other in the lifetime of the testator, or what, in Equity, are ordinarily called portions, there arises the presumption that one portion is given in part satisfaction of the other; and then, if that presumption arises, and is not rebutted, the donee has to bring into hotchpot that portion which he received in his lifetime, and in this way deduct it from that which he otherwise would take under the will.

Now by this will it is quite clear, I think, that the provision which was made for this and the other younger sons, by dividing among them the testator's share and interest, which he might have at his death, in his brewery business, was in the nature of a portion for each of those children. I take it that, for the purpose of determining that question, a "portion" means such a share of the father's personal property as he intends to be a provision for that son, or (as in this case) a substantial part of the provision for that son. The will was conceived in this way, as far as these younger sons are concerned. The shares which the testator might have at his death in the brewery business, and in the property comprised in that business, were to be divided equally among them; but, beside that, there was a certain share of the residue of the testator's property given to each, and also their names came within a series of limitations of strict settlement of the testator's real estate. Still, I do not doubt myself that these shares of the business (which seems to have been a valuable and extensive business) were such a substantial part of the provision made for the younger sons, that a gift among them may properly be considered as coming within the definition of "portions" for those children.

Then the next question is, was the gift made of the two twenty-fourth shares in that same business by the testator in his lifetime to this his youngest son, *Ernest*, a provision by way of portion? Now, on that subject, I confess I have the same doubt

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which the other members of the Court have expressed. One must look carefully at the circumstances under which that provision was made; and what presses very much upon my mind is this: this youngest son had been for thirteen years engaged as a clerk, and ultimately as a salaried manager of an important branch—the *London* branch—of that brewery business. Before this gift (if it be a gift) of the shares was made to him, he went to his father and pressed him, not for a share in the partnership, but for an increase in his salary. The father, it is said, was a very reticent man, and this application was renewed at different times; and on one occasion, when the conversation took place, he asked his son to visit him at his country house, evidently for the purpose of renewing the conversation, and that he might have an interval to make up his mind what he should do. The son did visit his father at his country house, and he details (and there is no attempt at contradiction of what he says) what took place between him and his father; and, according to his description, his father certainly on that occasion maintained his character for reticence; but the son pressed him very much that his salary should be increased, and the father told him that he had come to the determination (I am not attempting to give the very words), instead of increasing his salary, to give him two twenty-fourth shares in the business, to make him an acting partner, and that he indicated that this should take effect as from a date which had passed several months before, and that he was to bring into account the salary which he had received in the meantime, taking a share of the profits from that back date. Now that was the arrangement which the father made with the son in answer to repeated pressure from the son that he should have a larger remuneration for his work as manager of the business. To my mind that indicates plainly this—that the father was satisfied that the son had become a valuable manager of a part of the business, that he evidently desired to comply with the son's request, and something more, because the profits of the shares which he gave amounted to a larger amount than the son expected or was asking for, and that he did so for the purpose of encouraging the son to carry on the management of the business, and to be an acting partner in it. The father

evidently considered that that was very much for the advantage of the business.

Now just consider what the effect of that was. What was done, in fact, was this. A new deed was executed, and the other partners made no kind of objection upon the same, and these two twenty-fourth shares were given to the son by diminishing to that extent the shares which the father had in the business, so that practically they came out of the father's own share; and there was an advantage in making this arrangement to the other partners, because it relieved them of the payment of the salary which the business, up to that time, had been paying the son, and from the time when this arrangement was made the remuneration of the son was in fact paid by the father, because the father handed over to him, as I have pointed out, two of his own shares. If the father was right (and I cannot for one moment doubt that he was right) in giving every possible encouragement to this son to continue as an acting partner in the business, then he was doing the best thing he could do for the objects of his bounty mentioned in his will, because he was doing what he thought was best to do to secure that the business should be so carried on that at the time of his death it should be as valuable, or more valuable (and probably it was), than it was at the time when he admitted the son into this partnership. Now I am not satisfied that that is fairly to be considered a gift in the nature of a portion. The late Master of the Rolls, as has been pointed out, attempted something like a definition of what amounted to a portion within the meaning of the advancement clause in the *Statute of Distributions*, and he held in that case that small sums of money did not amount to advancement for that purpose; but whether his definition applies to a case of this kind or not, I confess I think it would be a dangerous thing to say that such a benefit given to the youngest son of the testator in the testator's lifetime was a gift of such a nature as to raise the presumption of double portions; and without expressing any final opinion, or saying more than that I seriously doubt that, I will proceed to the next question.

If by any proper use of language this can be called an advancement by way of portion, then we have to consider whether

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the presumption that would arise, that it was given in part of the provision which had been made by the father's will, is or is not rebutted. As I began by saying, it all comes round to this—what, on the whole of these facts, must be considered to have been the intention of the testator? Was it his intention to put this son, who was a skilled manager of the business, who had learnt it by some thirteen years' experience, when he was admitted as a partner in the father's lifetime, was it intended to put him, in consideration of that skill which he had shewn, in a somewhat better position than the other younger sons of the testator in respect of the business, or not? Which is the more reasonable conclusion to come to? I cannot divest my mind of the conviction that the more reasonable conclusion is, that the testator did intend, in consideration of the experience which he had of the son's capabilities in carrying on an important part of this business, to put him in a somewhat better position in respect of his interest in the business than the other younger children, who had never taken any part in the business at all. It is important to observe that the other younger children are older than *Ernest*; yet they were not admitted into the business during the father's lifetime at all. They were not experienced in the management of the business in any way; why they were not does not appear. It may have been from some disinclination on their part, or it may have been because the father wished them not to take part in the business. Of that I know nothing; but the fact remains, that here you have the one brother, who was a skilled manager in the business, and the others who are now seeking to invoke this doctrine of double portions against him, who were not skilled managers in the business at all. It seems to me that, in respect of that fact, that he was a skilled manager of the business, it is right and reasonable to suppose that the father intended that he should have this advantage, which he gave to him in his, the father's, lifetime; and I cannot help being moved a little by the consideration (though that, of course, by itself would not be enough to rebut the presumption) that the father never attempted to make any alteration in his will, and there is a good deal to be said for the argument, that those who are now insisting that the doctrine of double portions applies, are

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trying to introduce it so as to alter the natural effect of this man being brought in as a partner in his father's lifetime and the provision made by the will.

For these reasons I agree with the other Lords Justices. I think that this is a case in which, if that doctrine applied at all (as to which, as I have said, I have considerable doubt), the presumption is completely rebutted when you examine carefully all the circumstances of the case; and that, therefore, *Ernest*, the son in question, is not bound to bring into hotchpot or account for the two twenty-fourth shares which he took in this partnership during the father's lifetime.

Solicitors for Plaintiff: *Grover & Humphreys.*

Solicitor for Defendant *Ernest de M. Lacon: Wellington Taylor.*

Solicitors for Defendant *H. S. Lacon: Maples, Teesdale, & Co.*, agents for *G. B. Kennett, Norwich.*

Solicitors for Defendant *E. P. Youell: Robins & Co.*

M. W.

In re NATIONAL DEBENTURE AND ASSETS CORPORATION.

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KEKEWICH, J.
Jan. 13; *Feb.* 19.
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April 23, 28.

Company—Registration—Memorandum of Association subscribed by fewer than Seven Persons—Certificate of Registration—Conclusiveness of Certificate—Winding up—Jurisdiction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18 [*Revised Ed. Statutes, vol. xiv., pp.* 203, 206].

On a petition for the winding up of a company, which was already being wound up voluntarily under supervision, a doubt was suggested whether the memorandum of association, although it purported to be signed by seven persons, was not in fact signed by six persons only, one of the signatories having signed twice in different names:—

Held, by *Kekewich, J.*, and by the Court of Appeal, that the certificate of incorporation could not be treated as conclusive of the fact that seven persons signed the memorandum, and that if a less number had signed it the Court had no jurisdiction to make a winding-up order. But the Court of Appeal, being satisfied on the evidence that seven persons had in fact signed the memorandum, made the order asked for.

Peel's Case (1), and *Oakes* v. *Turquand* (2), distinguished.

PETITION.

The *National Debenture and Assets Corporation, Limited*, was

(1) Law Rep. 2 Ch. 674. (2) Law Rep. 2 H. L. 325.

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registered on the 8th of May, 1888, under the *Companies Act*, 1862.

In October and November, 1890, the company passed resolutions for a voluntary winding-up, and appointed a liquidator. On the 6th of November, 1890, an order was made by Mr. Justice *Kekewich* that the voluntary winding-up should be continued under the supervision of the Court, and continuing the liquidator.

This petition was presented by persons who claimed to be creditors of the company praying for a compulsory winding-up order and the removal of the liquidator. The Petitioners alleged the existence of divers irregularities in reference to the formation, conduct, and management of the company, and that unless the company were wound up compulsorily, or at all events an independent liquidator or liquidators were appointed, no proper investigation would or could be made into its affairs.

On the hearing of the petition, evidence was given to the effect that although the memorandum of association purported to bear the subscription of the names of seven persons, it was in fact signed by six persons only, as one of the signatories named *Henry Moore* had signed twice, once in his own name and once under an assumed name as *Frederick Sanguin*.

On this evidence being given the objection was taken that as the company had never been legally constituted, the Court had no jurisdiction to make any order upon the petition (1).

The petition came on for hearing before Mr. Justice *Kekewich* on the 13th of January, 1891.

Warmington, Q.C., and *C. E. E. Jenkins*, for the Petitioners:—

Assuming that *Moore* and *Sanguin* were one and the same person, so that the memorandum of association was signed by

(1) The *Companies Act*, 1862, s. 6, is as follows: "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company with or without limited liability."

Sect. 18 provides as follows: "A certificate of the incorporation of any company, given by the registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with."

six persons only, yet the certificate of incorporation given by the registrar is, under sect. 18 of the *Companies Act*, 1862, conclusive evidence that the company has been duly registered and is a subsisting company under the Act. The language of that section is express. The certificate is to be conclusive that "all the requisitions" of the Act in respect of registration have been complied with, and one of those requisitions is that contained in sect. 6, that the memorandum of association is to be signed by seven or more persons. The authorities bear out this interpretation of the section, and shew that the certificate is conclusive, notwithstanding any irregularity, however great.

In *Peel's Case* (1), the memorandum of association was improperly altered after signature, and Lord *Cairns* observed (2), that "the alteration entirely neutralized and annihilated the original execution and signature of the document," yet nevertheless held that the certificate was conclusive. In *Oakes* v. *Turquand* (3), Lord *Chelmsford* (4), said that the certificate prevented "all recurrence to prior matters essential to registration, amongst which is the subscription of a memorandum of association by seven persons." In *Glover* v. *Giles* (5), it was held that the Court has no power to declare the certificate of incorporation of a friendly society void, even though obtained by fraud.

Renshaw, Q.C., and *Ribton*, *Dunham*, and *George White*, for creditors, supported the petition in the event of the Court having jurisdiction to make the winding-up order.

Marten, Q.C., and *Warrington*, for the liquidator:—

As the memorandum of association of this so-called company was not signed by seven persons as required by sect. 6 of the *Companies Act*, 1862, there never has been any incorporation of the company under the Act, and consequently the Court has no jurisdiction to make a winding-up order under sect. 79; *In re Padstow Total Loss and Collision Assurance Association* (6). The case most nearly in point is *In re Nassau Phosphate Company* (7).

(1) Law Rep. 2 Ch. 674.
(2) Ibid. 681.
(3) Law Rep. 2 H. L. 325.
(4) Law Rep. 2 H. L. 354.
(5) 18 Ch. D. 173, 180.
(6) 20 Ch. D. 137.
(7) 2 Ch. D. 610.

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There one of the seven signatories to the memorandum of association was an infant, and though the Vice-Chancellor *Hall* held that the certificate was conclusive, yet he expressly founded his decision on the fact that there were seven signatures, and that the signature of the infant could not be treated as necessarily null and void. In *In re Northumberland and Durham District Banking Company* (1), there is an express *dictum* of Lord Justice *Turner* to the effect that if a company is not authorized to be registered, it is clear that the certificate of registration can be of no avail. Registration cannot make six persons into seven. Under sect. 18 the certificate is not conclusive as to those things which the statute makes essential to the existence and consequent incorporation of a company, but merely as to the machinery of registration, and so the Court of Appeal held in the similar case of the certificate of the Inclosure Commissioners: *Baroness Wenlock* v. *River Dee Company* (2).

Peel's Case (3); *Oakes* v. *Turquand* (4), and *Glover* v. *Giles* (5), were cases of mere irregularities in matters of machinery as to which the certificate was conclusive, and do not apply to a case such as the present one, in which the company registered never had in fact any legal existence as a company capable of registration.

[They referred also to *In re Hercules Insurance Company* (6); *Shaw* v. *Benson* (7), and the *Companies Act*, 1862, ss. 17, 18, and 199.]

Warmington, in reply:—

The company are estopped from raising this objection. There is no authority to shew that a company or any person representing them, can be heard to say that they are not registered, and evidence on their part to that effect ought not to be received.

KEKEWICH, J.:—

The point calling for decision in this case comes before the Court in so peculiar a manner that I may venture to call it unpre-

(1) 2 De G. & J. 357, 371.
(2) 38 Ch. D. 534.
(3) Law Rep. 2 Ch. 674.
(4) Law Rep. 2 H. L. 325.
(5) 18 Ch. D. 173, 180.
(6) Law Rep. 11 Eq. 321.
(7) 11 Q. B. D. 563.

cedented. The Petitioners are, or claim to be, creditors of the corporation which they seek to wind up; and their case is, that the history of the corporation shews that it has been begotten in fraud, has lived in fraud, and, so far as it is now dying or dead, is dead or dying in fraud. That is their general case, and they bring forward as an example or illustration of that fraud, and as supporting their allegations this circumstance, that more than two persons connected with the company were represented by one person, that there were frequent instances of what in another branch of the law is called "personation," and they in particular allege that two of the apparent signatories to the memorandum of association, *Henry Moore* and another, were and are one and the same person. The Petitioners do not make that a ground of the petition on which they seek to get a winding-up order, but they bring it forward as illustrating the fraud on which their petition is mainly based. They have adduced some evidence as to the particular instances of personation which, if not sufficient to conclusively prove what is asserted, is, at all events, sufficient to go to a jury on the point; and I think that a jury, with all the circumstances of the case before them as I have them before me, would at least be justified in inferring that there is sufficient proof of the identity of these two persons. That is the peculiar position of the Petitioners, as against whom it is now objected that they themselves have made out a case which prevents their obtaining the order which they seek, based upon the very allegations which are now turned against them.

On the other hand, the Petitioners say that the Respondents, the corporation, who are represented here by the liquidator, are registered; that they have carried on business; that they have in every way treated themselves as a public corporation, and urged the public to treat them in that character; and that the liquidator is not only the representative of the shareholders of the so-called company in so-called general meeting, but, more than that, he is an officer of the Court appointed and continued under the Act as official liquidator, and by an order which could no more have been properly made than the winding-up order which is now sought for could be made if in fact there was no company. It is said in short, that the company is estopped from

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setting up this case as an objection. I do not think it is necessary to deal with the question of estoppel. The point has been mentioned to the Court. The Court has to make the order, and will not knowingly make an order which is wrong in form and substance in a matter of this kind, however much the parties may be estopped from bringing forward any argument against it. I say "in a matter of this kind," because the question is one of jurisdiction. The parties may prevent the Court from seeing the facts and acting upon them, and then by their conduct there may be an estoppel. But upon a question of jurisdiction, I take it, the Court must make up its own mind, and is bound to disregard any question of estoppel. Therefore, it seems to me, that I must consider and decide this question which has been argued on both sides.

The question is this: I have no jurisdiction to wind-up this company, except under the Act. I have no jurisdiction to wind it up unless it is a company under the Act—that is to say, incorporated by registration under the Act. The jurisdiction given by sect. 79 of the *Companies Act*, 1862, is strictly so limited.

Therefore, I must, in the first place, consider whether this is a company under the Act. The objection is that, whereas the Act requires as a necessary preliminary to incorporation that the memorandum of association should be signed by at least seven persons; in this case, on what I now take to be the admitted facts, the memorandum was only signed by six persons, and, therefore, there is not and never has been a company—that is to say, a joint stock company or corporation under the Act.

The point turns on sect. 18 of the Act, which says that the certificate of incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of the Act in respect of registration have been complied with. That section refers back to sect. 6, which says that seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the Act in respect of registration, form an incorporated company with limited liability. Sect. 6 may be read as implying, if not expressing, that the subscription of seven or more persons is one of the requisitions of the Act in respect of

registration, because the two branches of the section are connected by the words, "and otherwise," shewing that the latter branch was only part of the whole, of which the first branch was also part.

But notwithstanding that, it does not seem clear to me, on the language of the Act, whether the signature of the memorandum by seven or more persons is one of the requisitions compliance with which is to be conclusively shewn by the certificate of registration. In the first place, looking at the matter entirely apart from authority, it strikes me as being unreasonable to suppose, notwithstanding the great advantages of finality in such matters, that the Registrar should certify conclusively that a memorandum has been signed by seven persons, when, in fact, no one of them has signed it at all. There may have been seven signatures made up of those of idiots, lunatics, and other persons not competent. There seems to be a very great difficulty in extending the conclusiveness of the certificate to such a case as that. Bnt the matter has been before the Court on several occasions, and I am told on either side that there are decisions which bind me, and which remove this case from the sphere of doubt.

The first case to be noticed is *Peel's Case* (1), which was heard by the Lords Justices *Turner* and *Cairns*, and in which judgment was given by Lord Justice *Cairns* alone after the death of Lord Justice *Turner*. It was not a judgment of the two; but that does not lessen the weight of Lord *Cairns'* authority; even the concurrence of Lord Justice *Turner* could hardly have increased that. It was said there, and in conformity with the facts, that after the memorandum of association had been signed by seven persons it was improperly altered, and Lord Justice *Cairns* was of opinion that that alteration was equivalent to an alteration of the deed so as to destroy the effect of the signatures, the result being that if it had stood there, the plea of *non est factum* would have held good as against that memorandum. The Registrar of Joint Stock Companies improperly, according to the judgment, accepted a memorandum so altered, and certified the incorporation of the company, and the Lord Justice held that under the section to which we are now referring, the incorporation was conclusively certified. I will not read again the passage which was

(1) Law Rep. 2 Ch. 674.

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read by Mr. *Warmington*, and which is expressed with the usual force and clearness of the Lord Justice; but Lord *Cairns* then went on to say (1) that "The Registrar, if he performs his duty carefully, will be the guardian of the public interest, by seeing that the memorandum is properly executed and properly brought for registration; but, whether he does so or not, when once a certificate of incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings." That seems to me to govern all that the Lord Justice said. He considered that all that was there wanting was a matter of regularity. The Registrar had not done what he ought to have done there—he had not taken care to see that the prior proceedings were regular—but whether he did so or not, the Lord Justice held that the certificate was conclusive, and, notwithstanding his strong language as to annihilation on the preceding page of the report, I conceive that was the real point which he decided.

Strangely, the very same point came before the House of Lords just about the same time. By an odd coincidence the last day of the hearing of *Oakes* v. *Turquand* (2) was the very day on which Lord Justice *Cairns* gave judgment in *Peel's Case* (3), but the judgment in *Oakes* v. *Turquand* was not delivered until the 15th of August, 1867, a few days afterwards, so that within a week or two the very same point was decided in the House of Lords. The way in which the point there arose is stated in the argument of counsel, and it is clear that the very same point was raised there. The memorandum had been altered after it had been subscribed, and the subscribers were not bound by that alteration, and if they had chosen could have avoided it. If the point had arisen in a way in which the plea of *non est factum* could have been raised, that plea would have been successful; but, notwithstanding that, the House of Lords held that the certificate of incorporation was sufficient. I see that *Peel's Case* was cited and commented upon, but I think not with regard to the point. Lord *Chelmsford*, L.C., dealing with the particular point, says (4): "I think the certificate prevents all recurrence to prior matters essential to registration"; that is the equivalent

(1) Law Rep. 2 Ch. 682.
(2) Ibid. 2 H. L. 325.
(3) Law Rep. 2 Ch. 674.
(4) Ibid. 2 H. L. 354.

to "prior proceedings" in Lord *Cairns'* judgment—"amongst which is the subscription of a memorandum of association by seven persons, and that it is conclusive in this case, that all previous requisites had been complied with."

If the Lord Chancellor had been really considering in *Oakes* v. *Turquand* (1) whether the certificate of the Registrar was conclusive that the memorandum of association had been signed by seven persons, of course I should not be discussing this point at length; but he was not considering that point. He was dealing with the question whether the Registrar could overlook the alteration, and accept the memorandum as having been signed, when it was not in fact signed at all, that is to say, when it was not the deed or instrument it purported to be. I am satisfied that he did not intend to express there an opinion that the certificate of the Registrar was conclusive as to the subscription of the memorandum by seven or any other particular number of persons. I observe, however, that there is this difficulty, and it is an observation on *Peel's Case* (2) as well as *Oakes* v. *Turquand*. If the certificate of the Registrar is conclusive when the memorandum has in point of law not been signed by any of the apparent signatories, surely it ought to be conclusive when on inquiry it turns out not to have been signed by one only. That is, no doubt, a weakness in the criticism of both of these judgments; but I do not think that goes to the root of the matter, because neither Lord Justice *Cairns* nor Lord *Chelmsford* points at all to the case of signature by or on behalf of a non-existent person, and I do not see a word in their judgments either directly or indirectly, saying that if one man chose to sign seven names and took them to the Registrar, though those names were mere fancy names, names which could not be connected with any living persons, yet there would be a company incorporated—a corporation—without corporators. And yet, to my mind, if the argument in support of the incorporation of the company is pushed in this case to its legitimate length, it must extend to this, that you may have a corporation in which there are no members because all the signatories are persons who have no existence.

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 2 Ch. 674.

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I have thus far dealt with the case on the authorities which are against the view which, on consideration, I am myself disposed to take; but there are decisions the other way. In the case of *In re Northumberland and Durham District Banking Company* (1), which arose, not on the Act of 1862, but on the previous winding-up Act, which really contained the same provisions, Lord Justice *Turner*, in dealing with the point, declined to be bound by certificate, if in fact the company could not be registered. A similar question came before the Court of Appeal in *Baroness Wenlock* v. *River Dee Company* (2), where the case I have just mentioned was cited and commented on. Lord Justice *Lindley*, in giving judgment, says, summing it up in the words to which Mr. *Renshaw* called my attention: "I think it"—that was the certificate of the Inclosure Commissioners—"is conclusive as to all matters of machinery, all steps of that kind, but not as to the capacity to enter into a contract." Again, I see great difficulty in drawing the line, particularly with *Peel's Case* (3) and *Oakes* v. *Turquand* (4) before me, between what is machinery and what is not; but I cannot think that the capacity of any person, any signatory, to enter into a contract—a contract which by sect. 11 of the Act of 1862 is made equivalent to a contract under seal—is a matter of machinery, or concluded by the Registrar's certificate.

The only other case which I need notice is that of *In re Nassau Phosphate Company* (5), before Vice-Chancellor *Hall*. It is not competent to me to say that that decision is incorrect, and I can conceive it quite possible that, apart from all other points which have been argued to-day, the decision in the case might be upheld on the ground which is noticed by the Vice-Chancellor himself in the earlier part of the judgment, that a contract by an infant is not necessarily void, but may be only voidable, and that therefore you cannot set it aside at once as nothing—you must do something more than that; you cannot treat it merely as non-existent. I think it only right and fair to the parties before me to add that if the Vice-Chancellor's decision

(1) 2 De G. & J. 357.
(2) 38 Ch. D. 545.
(3) Law Rep. 2 Ch. 674.
(4) Ibid. 2 H. L. 325.
(5) 2 Ch. D. 610.

cannot be supported on that ground I should find great difficulty in following it otherwise than as a matter of loyalty to a decision of some years' standing by a Judge of co-ordinate jurisdiction. The Vice-Chancellor puts the difficulty himself. It is not the business of the Registrar to go into and determine these points; he puts that as the reason why the certificate is conclusive. To my mind, it is a reason why it is not. The Registrar cannot go into the question; he has no judicial powers, except as a matter of machinery, but must accept the attested signatures. The residences and occupation of the signatories have to be stated, and there is an attestation, which is generally by the solicitor who registers the company. That is his guarantee of good faith. If the Registrar thought fit to question it, supposing suspicion were aroused on account of the signature of any one person being unattested, or of his being an infant, or on any other ground, I do not see how the Registrar could possibly determine the question; and, as he could not judicially determine it, it seems to me, for that very reason, his certificate ought not to be accepted as conclusive. Regarding the case from that point of view, and looking at the Act, and the authorities, it seems to me that the certificate cannot be treated as conclusive of the fact that seven persons signed the memorandum of association.

The Petitioners' case is that seven persons did not sign the memorandum. I infer from the evidence that they did not, but that six persons signed and that one of them, either with his own hand or by some one else, signed on behalf of a non-existent person. It may be that only five persons signed; but if only six signed, there was no company incorporated. The resolution on which the liquidator's authority depends was not a resolution of the company in general meeting. It may or may not have been a resolution of a certain number of persons carrying on business together in partnership—that I cannot say now. The supervision order which I made was for winding up a company which did not exist. No order can be made now for a compulsory winding-up, and therefore I refuse the petition.

I have thought it right to deal with the question at length, because I see the importance of it in this case and possibly in

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others. I have not heard Mr. *Marten* on the merits, and therefore I withhold my final opinion, but I have heard the arguments in favour of a winding-up order, addressed to me with the concurrence of creditors appearing reluctantly and on reflection supporting the application for a winding-up, and in case the matter should go further I think it only right to add that, subject to what I might hear in argument from Mr. *Marten* and Mr. *Warmington*, this does seem to me, as at present advised, eminently a case in which a winding-up order ought to be made, in order that the whole of this history may be gone into thoroughly, either under the immediate sanction of the Court, or by the Official Receiver, whose business it would be to do it more thoroughly than it is possible for the present liquidator to do it.

Nothing has been said against the personal character of the liquidator. He was appointed by the company. He was continued when the order was made for supervision, and he remains, with what authority he has, for the present. He has not been attacked, but I am bound to say that even if he has any authority—that is to say, if the company is a company, and the matter comes back to me—I should not be disposed to leave him where he is. I think the proper course to take in that case, as at present advised, would be to make the usual winding-up order and let the matter take the course which has become usual since the 1st of January, 1891. The petition failing, I can do nothing now but dismiss it with costs. I cannot make the liquidator, who comes here and who probably has no means of recouping himself, pay any part of these costs. All the other parties appearing support the petition, and therefore can have no costs.

C. C. M. D.

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From this decision the Petitioners appealed. The appeal came on to be heard on the 23rd of April, 1891. The Court of Appeal not being satisfied that the evidence adduced in the Court below was sufficient to shew that *Henry Moore* and *F. Sanguin* were the same person, directed the hearing to stand over till the 28th of April, on which day Messrs. *Kotchkie* and *Wickens*, directors of the company, and Mr. *Watson*, a solicitor,

were examined in Court. Their Lordships came to the conclusion from this evidence that *Moore* and *Sanguin* were different persons, and that there were in fact seven signatories to the memorandum of association.

Warmington, Q.C., and *C. E. E. Jenkins*, for the Appellants.

Marten, Q.C., and *Warrington*, for the liquidator.

G. White, for the creditors.

LINDLEY, L.J.:—

This is a petition of a somewhat unusual character as regards the circumstances under which it is presented, although it is common enough in point of form. A company was formed apparently in a proper way, by the registration of a memorandum of association with seven signatures, and it was registered on the 8th of May, 1888. There has been a voluntary liquidation, which has been converted into a liquidation subject to the supervision of the Court. Now some of the creditors are of opinion that matters require investigation which could be more effectually done under a compulsory order, and have therefore presented a petition for a compulsory order. The case came before Mr. Justice *Kekewich*, and he dismissed the petition upon the ground that the company in question consisted of less than seven members, and had always consisted of less than seven members, and that there was no jurisdiction to wind it up. His decision on that point was based on the construction of the 6th and 18th sections of the *Companies Act*, 1862, and although by the 18th section it is enacted that "A certificate of the incorporation of any company, given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with," it was decided as long ago as the time of Lord Justices *Knight Bruce* and *Turner*, that the Registrar could not by a certificate create a jurisdiction in himself so as to enable companies to be registered to which the Act had no application. It is a condition precedent, for example, that the company shall be registered under

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the Act, that it shall consist of seven members, and if it consists of four or five, the Registrar cannot, by his certificate, incorporate the company. Mr. Justice *Kekewich* came to the conclusion that this company had not consisted of seven members, and if that had been right in point of fact, his decision would have been correct in point of law. We did not feel satisfied ourselves about the fact, and we directed the petition to stand over, and that there should be liberty to the Petitioners to adduce evidence before us on that point. That accounts for the somewhat unusual circumstance that we have had gentlemen here examined as witnesses; and having heard their evidence it seems to me there is no reason to suppose that there were not seven persons who signed that memorandum. It is quite obvious that Mr. *Moore* is one person, Mr. *Sanguin* is another person, and Mr. *Kotchkie* is a third person; and although doubt was thrown on the existence of seven signatories, the evidence does not, to my mind, rebut the presumption which would be, after the certificate given by the Registrar, that the Act was duly complied with and that there were seven. Therefore, the doubt which induced Mr. Justice *Kekewich* to refuse to make an order is dispelled by the further evidence which has been adduced before us.

It comes, therefore, now to the simple question of whether it is necessary and proper for the protection of the creditors to make a winding-up order—a compulsory order, instead of continuing the supervision order. I certainly have not heard any attack made on the present liquidator, Mr. *Hibbert*, and it seems to me on the evidence that he has done his duty, as far as the Court knows, as well as he could under the circumstances. But the company is a curious company; there is a great deal to be found out, and the powers of the Court, especially now since the modifications which have been made by last year's Act, to enquire into tricks or malpractices under a compulsory order are very considerably larger than they are under a voluntary winding-up, or a supervision order. Under the circumstances it appears that the creditors are entitled, in my opinion, to have a compulsory order, and therefore a compulsory order will be made. It will be made in the usual form, with the addition,

however, of some words which will protect Mr. *Hibbert*, and entitle him to be paid out of the assets his costs, charges, and expenses properly incurred as a voluntary liquidator.

BOWEN, L.J.:—

I am of the same opinion. The certificate of the Registrar cannot cure a fatal blot which is caused by a smaller number of persons purporting to form a corporate body than the Act of Parliament requires. That is clear by the language of sect. 6 and sect. 18 of the Act of 1862. Sect. 6 provides that seven or more persons may form a company. How? By subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act. It does not say less persons than seven will do. What does it mean by the seven persons complying with the requisitions of the Act? It means that they are to do that which is prescribed by sects. 17 and 18. Sect. 18 says, "A certificate . . . shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." Amongst others there is the requisition that the seven persons shall subscribe their names. It does not say that less than seven persons can do it. It seems to me, therefore, that the learned Judge was perfectly right in his view of the law. But when we find a memorandum of association signed by seven persons, it lies on those who wish to say it is not signed by seven persons to prove it. Whatever the cloud may be that hangs over the origin of this company I do not think that the burden of proof has been shifted, or that there is evidence on which we can safely act to the effect that there are not seven persons here who signed the memorandum of association by themselves, or by somebody authorized to sign it for them.

KAY, L.J.:—

I also am clearly of opinion that these words at the end of sect. 18, "A certificate of the incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with," do not mean that if less than seven persons subscribe

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their names to a memorandum, and by some oversight on the part of the Registrar obtain registration of a pretended company so formed, the certificate of the Registrar shall be conclusive that that was a corporation. It is obvious that to hold that would be to give the Registrar practically the power of incorporating a company consisting of fewer than seven members, whereas the Act says a company to be incorporated under the Act must consist of seven or more persons. The least examination of the section shews that such a construction would not be consistent even with the words of it. Sect. 6 is, "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability." Then sect. 17 provides for the registration of the memorandum, and the articles of association. Sect. 18 which follows upon that at once contains at the end of it the words I have read, which shew that the certificate is to be conclusive that the requisitions in respect of registration have been complied with. I take it to mean the requisition of the 17th section, rather than the requisition of the 6th that the number of people who are to form a company must be not less than seven.

Now before the learned Judge in the Court below, it seems that some doubt was cast upon the signatures which had actually been obtained to this memorandum, and there was a suggestion, which the learned Judge thought satisfactorily made out, that one of the signatories was either a non-existing person, or that two of the signatures practically had been appended by one and the same person, so that there were in fact not more than six signatures. We have allowed further evidence to be given on that point, because the matter was not very well cleared up by the evidence before the Judge, and from the evidence given before us this morning I think it quite plain that the suggestion that there were not seven signatures is ill-founded. There were seven signatories.

Then the question remains, there having been a voluntary winding-up, whether under sect. 145 it is proved to the satisfaction of the Court, or that the Court should be of opinion, that

the rights of the creditors who are the present Petitioners will be prejudiced by a voluntary winding-up. Without going into the circumstances very particularly, I am satisfied that the Petitioners' rights will be prejudiced by a mere voluntary winding-up. Nothing is or could be said against the voluntary liquidator, who it is said was the nominee of a creditor actually, and is a person, I assume, of the utmost possible respectability, and who will fulfil his duties as a liquidator. But here is a company with respect to which, to say the least of it, there is a very strong suspicion of irregular and improper proceedings—I will not use stronger language now—and it is a very different thing to have a company as to the formation and conduct of which such suspicion exists, wound up by a voluntary liquidator even subject to the supervision of the Court, from having that company wound up under a compulsory order; and I think this case is one in which looking to the facts that have been already brought before us a compulsory order will certainly be more for the benefit of the creditors than the voluntary winding-up as it at present exists.

Therefore I entirely concur that there ought to be a compulsory order in this case.

Solicitors: *Saunders, Hawksford, Bennett & Co.; Edward Lee & Davis; Watson & Watson; Goldring, Mitchell, & Philips.*

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Trade-mark—Old Mark—"Special and Distinctive Word"—"User"—Combination with other Marks—Separation of Marks—Composite Mark—Registration—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *s.* 10—*Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57)—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

In 1882, *Heidsieck & Co.*, a French firm of champagne growers, registered, under the *Trade Marks Registration Act*, 1875, the words "*Monopole*" and "*Dry Monopole*," as separate trade-marks for separate kinds of champagne, on the ground of user of those marks before the Act; but they never had, in fact, used those words alone as marks; for upon the labels, wrappers, corks, and cases for their bottles they had always used them in conjunction with the name of the firm, "*Heidsieck & Co.*," which they also registered by itself in 1882 as a trade-mark under the Act; and upon the corks and cases there were, besides, various devices which had been registered as trade-marks under the Act. On the cases, "*Monopole*," or "*Dry Monopole*," appeared on one side alone, while on another side was "*Heidsieck & Co.*" alone, and on one of the ends was one of the firm's registered devices alone. The firm sold other brands of champagne under distinctive registered labels, bearing the name of the particular brand, and always the name of the firm underneath.

Upon a motion under the Act of 1875, and the *Patents, Designs, and Trade Marks Acts*, 1883 and 1888, to expunge "*Monopole*" and "*Dry Monopole*" from the register of trade-marks:—

Held, by *Kay*, J., and by the Court of Appeal, that those words had not been so "used as trade-marks before the passing of the Act," within the meaning of sect. 10 of the Act of 1875, as to entitle *Heidsieck & Co.* to have them registered; and they were accordingly ordered to be expunged from the register.

What is "user as a trade-mark" under sect. 10 of the Act of 1875, explained.

In re Spencer's Trade-marks (1) discussed.

IN 1876, Messrs. *Heidsieck & Co.*, champagne growers of *Reims, France*, applied for the registration, under the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), of numerous trade-marks used by them for various brands of champagne, and these marks were registered accordingly. The several marks were

(1) 3 Rep. Pat. Cas. 73.

described in the *Trade Marks Journal* of the 13th of September, 1876.

One of these trade-marks, which was used as a label for bottles of champagne of a brand called "*Monopole*," was in the following form:—

Monopole.

Heidsieck & Co.,

Fournisseurs brevetés de S. M. l'Empereur d'Allemagne.

Reims.

Established 1785.

Another trade-mark used as a label for a brand called "*Dry Monopole*" was in precisely the same form, except that the words "*Dry Monopole*" were substituted for "*Monopole*." Both marks were stated in the *Trade Marks Journal* to have been used "fifteen years or thereabout before the 22nd of March, 1876."

The "*Monopole*" bottles were sold in wrappers printed as follows:—

Monopole.

Heidsieck & Co.,

Reims.

The "*Dry Monopole*" bottles were sold in wrappers of a similar form.

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Another trade-mark was in this form:—

Established 1785

Heidsieck & Co.

Reims

That trade-mark was stated by the *Trade Marks Journal* to have been used "eight years or thereabout before the 22nd of March, 1876."

Then there was another trade-mark, intended for branding on the bottom of the champagne corks, consisting of the device of a comet, encircled by the words "*Heidsieck & Co., Reims.*" There were also two other trade-marks, one consisting of an anchor simply, and the other of the same anchor with the words "*Heidsieck & Co.*" in a semicircular form round it, and the word "*Reims*" within the semicircle and across the middle of the shank of the anchor.

There were also trade-marks of labels bearing the names of other brands of champagne, such as "*Grand Vin Royal*" and "*Sillery Mousseux,*" the words "*Heidsieck & Co., Reims,*" being printed under the name of each brand.

In July, 1882, *Heidsieck & Co.* applied for registration under the *Trade Marks Registration Act,* 1875, of three trade-marks, consisting of, first, the word "*Monopole*" alone; secondly, of the words "*Dry Monopole*" alone; and, thirdly, of the words "*Heidsieck & Co.*" alone; the applications being made on the ground of alleged user prior to the 13th of August, 1875, the date of the passing of the Act. These three marks were, in fact, stated in the *Trade Marks Journal* as having been used, as to the first two, "since 1861," and, as to the third, "by applicants and their predecessors in business, since 1785." The three marks were accordingly registered, the registration being

advertised in the *Trade Marks Journal* of the 20th of December, 1882.

The words "*Monopole*" and "*Dry Monopole*" had been previously registered by *Heidsieck & Co.* in *France*, and, it was said, had been extensively used by them there in connection with champagnes.

In March, 1889, this action was instituted by a firm of *Samuel Richards & Co.*, the sole English importers and sellers of *Heidsieck & Co.'s* wines, and (by subsequent amendment) by a firm of *Walbaum, Luling, Goulden & Co.*, who had succeeded to the business and goodwill of *Heidsieck & Co.* and had also become the registered proprietors of the two trade-marks, "*Monopole*" and "*Dry Monopole*," against the Defendants, Messrs. *Butcher & Robinson*, an English firm of wine-merchants, for an alleged infringement of those two trade-marks by the use of the word "*Monobrut*" in connection with champagne.

The action now came on upon a motion by the Defendants, under the *Patents, Designs, and Trade Marks Acts*, 1883 and 1888, and the *Trade Marks Registration Act*, 1875, for an order to expunge the two trade-marks "*Monopole*" and "*Dry Monopole*" from the register. In support of the motion the Defendants adduced evidence to shew that the words "*Monopole*" and "*Dry Monopole*" upon the labels, corks, and packing-cases used in the sale of *Heidsieck & Co.'s* champagnes had never been used by themselves, but always in conjunction with other words or devices. On the other hand, the Plaintiffs' affidavits stated that the words were intended to be, and had been in fact, adopted and used by themselves and their predecessors as separate trade-marks, apart and distinct from any other mark, in accordance with their registration.

The motion now came on for hearing. Four classes of exhibits were produced in evidence at the hearing. The first consisted of samples of labels used for the bottles of *Heidsieck & Co.'s* "*Monopole*" and "*Dry Monopole*" champagnes, these sample labels being in the form of the facsimile first given above. The second consisted of samples of wrappers in which the bottles were folded, these sample wrappers being in the form of which a facsimile is also given. No instance was furnished in which a

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label or wrapper had been used bearing the word "*Monopole*" or "*Dry Monopole*" alone, without the addition of other words and figures.

The third class of exhibits consisted of corks, branded on the side near the lower end with "*Monopole*" or "*Dry Monopole*," and on the bottom with the above-mentioned device of a comet surrounded by the words "*Heidsieck & Co., Reims*," these brands being, of course, only visible to a purchaser of a bottle of champagne upon the cork being drawn.

The fourth class of exhibits consisted of cases or boxes used for packing the bottles of "*Monopole*" or "*Dry Monopole*" champagne, each bottle having been previously enfolded in a wrapper as above described. Each case had, on the top, the word "*Top*" in large print, and also a stencilled representation in outline of two champagne bottles lying side by side. On one side of the case was the word "*Monopole*" or the words "*Dry Monopole*"; and at one end there was branded the above-mentioned device of the anchor, with the words "*Heidsieck & Co.*" round it in a circular or semicircular form, and the word "*Reims*" across it, that being the only form in which the words "*Heidsieck & Co.*" appeared upon the case.

The motion came on for hearing before Mr. Justice *Kay*, on the 10th of November, 1890.

Sir *R. Webster*, A.G., *Aston*, Q.C., and *John Cutler*, for the Defendants, in support of the application:—

The word "*Monopole*" is incapable of being registered as a trade-mark under sect. 10 of the *Trade Marks Registration Act*, 1875 (38 & 39 Vict. c. 91), for two reasons—first, because it is not "special and distinctive"; and secondly, because there has been no such use of it as a trade-mark before the passing of the Act as to entitle it to registration.

"*Monopole*" is a French word signifying "monopoly"; and the meaning of it, as used to distinguish an article sold, simply is, that the proprietor who supplies the article has a monopoly in that article. As used by *Heidsieck & Co.* on their bottles of champagne, the word simply intimates to the public, "This champagne is a wine which we have the exclusive right to sell."

But the exclusive right to sell his own champagne is common to every manufacturer of that article. The word, therefore, indicates a right which is common to the trade, and is neither special nor distinctive: *In re Van Duzer's Trade-mark* ("*Melrose Favourite Hair Restorer*") (1); *In re Leaf, Sons & Co.'s Trade-mark* ("*Electric Velveteen*") (2); *Raggett* v. *Findlater* ("*Nourishing Stout*") (3); *In re Arbenz' Application* ("*Gem Air-Gun*") (4).

Then as to the user, it is clear upon the evidence that before the passing of the Act of 1875 the word "*Monopole*" alone never was used by *Heidsieck & Co.* as a trade-mark. It was always used by them, whether on their labels, their corks, their cases, or their wrappers, in association with some other words or with some device. The authorities are clear that such a user is not sufficient, and that, in order to entitle a word such as "*Monopole*" to registration, it must have been used alone as a trade-mark before the Act, and not in combination with any other words: see *Perry Davis & Son* v. *Harbord* (5), where the user before the Act of the words, "*Perry Davis' Vegetable Pain-Killer*," was held not to confer a right to register "*Pain-Killer*" as a trade-mark; *In re Palmer's Trade-mark* ("*Braided Fixed Stars*") (6); *In re Leonard & Ellis's Trade-mark* ("*Valvoline*") (7); *In re Spencer's Trade-marks* (8). The last case is directly in point. There the words, "*Diamond Cast Steel*," had been registered as a trade-mark under the Act of 1875. It appeared that these words had never been used on goods by themselves, but always in conjunction with another registered mark and the name of the manufacturer of the goods, though the words were sometimes on one side of the goods and the other mark on the other side, and the Court of Appeal held that the case was within the principle of *In re Palmer's Trade-mark*, and that the mark must be expunged from the register.

[KAY, J.:—It was not there decided that the mere association of the name of the manufacturer was sufficient to prevent the word or device from having been used alone as a trade-mark.]

(1) 34 Ch. D. 623.
(2) 33 Ch. D. 477; 34 Ch. D. 623.
(3) Law Rep. 17 Eq. 29.
(4) 35 Ch. D. 248.
(5) 15 App. Cas. 316.
(6) 24 Ch. D. 504.
(7) 26 Ch. D. 288.
(8) 3 Rep. Pat. Cas. 73.

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The test is whether the associated words have been so used as that they, together with the word which it is sought to register alone, could have been registered as a single trade-mark. A most important object of a trade-mark is to shew the source from which the goods marked with it emanate. If the manufacturer puts his name or address on the goods, he puts on them that which discharges an important part of the functions of a trade-mark. In fact, the name of the manufacturer is in itself capable of being a trade-mark: *Ainsworth* v. *Walmsley* (1); *Leather Cloth Company* v. *American Leather Cloth Company* (2): and here the name of "*Heidsieck & Co.*" was registered as a trade-mark by itself, and also in combination with "*Monopole*" and "*Dry Monopole.*" It is impossible to say that "*Monopole*" and "*Dry Monopole*" are "special and distinctive" marks; for it has been shewn that on the labels, wrappers, corks, and cases they have always been used in combination with other marks. The principle of the decisions is that the user entitling to registration must be a user of the word or mark entirely separate and by itself. If anything else is associated with it, if any other words or mark are put on any part of the goods, user is insufficient.

Moreover, the qualifying user must have been in the *United Kingdom: Re Munch's Application* (3). Therefore, the evidence in the present case of user of the word "*Monopole*" in *France* must be disregarded.

Lastly, even if "*Monopole*" can stand, it is clear that "*Dry Monopole*" cannot, for that is manifestly descriptive of the article sold.

Sir *H. Davey*, Q.C., *Rigby*, Q.C., *Renshaw*, Q.C., *Sebastian*, and *Pattisson*, for the Respondents, the Plaintiffs:—

Taking the case of the word "*Monopole*" only (that of the words "*Dry Monopole*" being identical), the simple question to be decided in this case is, what was the trade-mark which *Heidsieck & Co.* used before the passing of the Act of 1875? Was it the word "*Monopole*," or was it that word associated with something else? In *Perry Davis & Son* v. *Harbord* (4), *In re*

(1) Law Rep. 1 Eq. 518.
(2) 11 H. L. C. 523, 534.
(3) 50 L. T. (N.S.) 12.
(4) 15 App. Cas. 316.

Palmer's Trade-mark (1), and *In re Spencer's Trade-marks* (2), the question was, no doubt, the same, namely, what was the trade-mark; but the facts were essentially different. Here the evidence shews that the trade-mark was "*Monopole*," and "*Monopole*" only. It was that which was registered in *France*, and by it, and it alone, the champagne was known. Before the Act of 1875 no person acquainted with the facts would have doubted that the word "*Monopole*" was the trade-mark of *Heidsieck & Co.*, and they were entitled to protection for it, whether used together with their name or not. In *In re Palmer's Trade-mark* all the learned Judges were agreed that that which had been used as a trade-mark was not merely the words "*Braided Fixed Stars*," but the whole label, and that it was not competent to the parties to pick out those words from an elaborate label and claim registration of them detached from their accompaniments. In *In re Leonard & Ellis's Trade-mark* (3) the word "*Valvoline*" was only one element of the trade-mark; what had been used as a trade-mark was the combination of "*Valvoline*" with the perforated shield or crescent. In *In re Spencer's Trade-marks* the real trade-mark was what may be termed a "composite" trade-mark; it was a combination of three well-known elements—a crescent, a "Z," and a diamond; this mark was used by other members of the manufacturer's family; and previously to 1875, in order to distinguish his goods from theirs, he added the words, "*Diamond Cast Steel*," and then sought to treat these words as a separate mark, and register them separately. The case was treated as one in which the owner of two marks had used them in combination as one mark, and that it was held he could not do. *In re Palmer's Trade-mark* was also a case of a "composite" trade-mark. If a man has two marks, he is at liberty to use the two on one article; but he must not so use the two as to lead to the inference that they are in fact one. *Spencer's Case* is clearly distinguishable from the present; for there it was held that you cannot by distributing over the article of manufacture parts of the trade-mark say that the whole is not the trade-mark; in short, that you cannot pick out part of the trade-mark and say that this

(1) 24 Ch. D. 504. (2) 3 Rep. Pat. Cas. 73.
(3) 26 Ch. D. 288.

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part is in itself a trade-mark; whereas in the present case the various names and devices with which the words "*Monopole*" and "*Dry Monopole*" were used were themselves trade-marks and registered as such. On the boxes it is especially noticeable that "*Monopole*" and "*Dry Monopole*" appear on one side quite by themselves; for every purpose of inspection those marks are dissociated from any others. Looking at the boxes, no one could say that the several marks form one composite mark, as in *Spencer's Case* (1). *Perry Davis & Son* v. *Harbord* (2) is, perhaps, the nearest case to the present; but there the words actually used were "*Perry Davis' Vegetable Pain Killer*," and it was sought to register the words "*Pain Killer*" only; those words never had been used alone and never had been used independently of the name "*Perry Davis*;" and a ground of the decision was that the words "*Pain Killer*" were not special and distinctive. In the present case, the fact that the word "*Monopole*" has always been used, but in combination with different words when used in different ways, is strong evidence to shew that "*Monopole*" alone has been the trade-mark, and that the words "*Heidsieck & Co.*" have been added, not as a part of the trade-mark, but merely as a means of advertising the name of the manufacturers. Sect. 10 of the recent Act, the *Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 Vict. c. 50), may be referred to as shewing the distinction which the Legislature has drawn between the user of a name or business address and that of other words.

The argument of the other side leads to this absurd result, that if a trade-mark is used on goods, and any other words are used on any other part of the goods, such as for example, "Glass with care," or "Perishable goods," the trade-mark is thereby disentitled to protection.

The contention that the word "*Monopole*" is not "special and distinctive" cannot be seriously maintained. It is clear upon the evidence that the word as used did distinguish Messrs. *Heidsieck & Co.'s* wine from the wine of any other merchant, and that the word was used specially and exclusively to distinguish that wine. The registration in *France* is a fact of great importance. The

(1) 3 Rep. Pat. Cas. 73. (2) 15 App. Cas. 316.

manufacturers informed the French Courts that the brand by which they desired their goods to be known was the word "*Monopole*," and that is what the French Courts registered. Even if the word meant that they had a monopoly, it would not be descriptive but distinctive.

It may be conceded that user in the *United Kingdom* is necessary to satisfy sect. 10 of the Act of 1875, and that foreign user will not do. But there is ample evidence of user here, and very slight evidence of user will suffice: *In re Palmer's Trade-mark* (1); *In re Chorlton & Dugdale's Trade-mark* (2).

Sir R. Webster, in reply:—

It is suggested that if the word "*Monopole*" would have been generally understood before the Act of 1875 as indicating the wine of *Heidsieck & Co.*, that is conclusive to shew that it is capable of registration. But that view is erroneous. The character of the user must be regarded; and the test is not what the parties intended, but what is the business result of that which has been done. It is said that the registration in *France* shews the intention to register "*Monopole*" alone here; but the conditions as to registration in *France* may be entirely different. *In re Spencer's Trade-marks* (3) is a clear authority that if a man has two marks he cannot by separating them from each other through placing them on different parts of the goods entitle himself to register one without the other. The test there applied was, what had in fact been user. *Perry Davis & Son* v. *Harbord* (4) is to the same effect. Here there is no evidence that, as a trade-mark before the public, "*Monopole*" or "*Dry Monopole*" has ever been used alone. The real fact appears to be that those words, coupled, as they always were, with something else, were used merely to indicate a particular description of wine, just as "*Grand Vin Royal*" and "*Sillery Mousseux*."

KAY, J.:—

This case involves a question which, to some extent, is novel. It is an application to strike off the register two trade-marks

(1) 24 Ch. D. 504.
(2) W. N. (1885), p. 164; 34 W. R. 60.
(3) 3 Rep. Pat. Cas. 73.
(4) 15 App. Cas. 316.

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consisting of a word or words only, one being "*Monopole*," the other "*Dry Monopole*."

Now, in order to register a word or words of that kind, not being a fancy word or words, as these are not, it is necessary that they should have been used as a trade-mark before the year 1875. That is by virtue of the Act of 1875 (38 & 39 Vict. c. 91), s. 10, which says, that "For the purposes of this Act, a trade-mark consists of one or more of the following essential particulars; that is to say:" and then, taking the paragraph which applies to this case, "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act."

Now, naturally it was held at once upon that section that it will not do to pick out of a trade-mark consisting of a number of words, or of words and devices, some of the words, or the words only, omitting the devices, and to say, "That is a user which entitles us to register the words alone." The words must have been used as the only words of a trade-mark; or, to put the proposition in another form, the words which it is sought to register under the Act of 1875 must have been used as a trade-mark, and used by themselves as a trade-mark.

Then, what does "user as a trade-mark" mean? I have never doubted—and I will quote authority to shew that I am not relying on my own opinion alone—that "user as a trade-mark" means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand when the trade-mark or so-called trade-mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade-mark. That is the trade-mark proper; and user as a trade-mark means, and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade-mark of the person who uses them.

In the present case I have these different things. I have upon a champagne bottle a label containing the word "*Monopole*,"

in Roman type, and below it "*Heidsieck & Co.*" in a running hand, and then "*Fournisseurs brevetés de S.M. l'Empereur d'Allemagne, Reims. Established* 1785." Upon another bottle there are the same words, except that the words "*Dry Monopole*" are substituted for "*Monopole*"; and, as I have said, the trade-marks impeached are "*Monopole*" and "*Dry Monopole,*" which have been registered alone. Besides that, upon the corks of the same bottles, inside, but so impressed that you could not see the marks without drawing the cork, there is, on the "*Monopole*" bottle, the word "*Monopole*" on the side of the cork; and on the bottom of the cork, inside the bottle, a comet with the words "*Heidsieck & Co., Reims,*" in a circle round it; and the same as to the "*Dry Monopole*" bottle, except that the words on the cork are "*Dry Monopole*" instead of "*Monopole*" only. Then the bottle is sold in a wrapper upon which are the words "*Monopole,*" in Roman letters, and "*Heidsieck & Co., Reims,*" in a running hand; and the same as to the "*Dry Monopole.*" Then there are the cases in which these bottles, with the wrappers upon them, are sold, and these cases have on the top a representation of two bottles lying side by side stencilled in outline, and there is the word "*Top,*" and on one side the word "*Monopole,*" or "*Dry Monopole.*" At one end there is a brand consisting of the words "*Heidsieck & Co.,*" in a circular or semi-circular form, an anchor in the middle, and the word "*Reims*" across the middle of the anchor. These are the only things I now have to deal with, and I must take them *seriatim.*

The question is, does any one of these things amount to a user of the word "*Monopole,*" or of the words "*Dry Monopole,*" as the sole trade-mark? I will take the words used by the Master of the Rolls in *Spencer's Case* (1) to shew that what I said just now, as to the test of what is a trade-mark and what is not, is supported by a very much higher authority than mine. He says this (2): "That leads us to this question: were those words, in fact, used as a trade mark before 1875? What is the test? It seems to me that *Palmer's Case* (3) says this, 'Is it usual in the trade?' How does a man use a trade mark in his trade? By putting it

(1) 3 Rep. Pat. Cas. 73. (2) 3 Rep. Pat. Cas. 74.
(3) 24 Ch. D. 504.

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on his goods. By using it either by stamping it on his goods, or by putting a label on his goods. You do not use a trade mark by having it shut up in your warehouse; you do not use a trade mark by having it put up in your warehouse; and you do not use a trade mark by advertising it in a newspaper. It is only by putting it on your goods, so that when your goods are sold in the market there is the distinguishing mark. Therefore, the learned Judges said: 'In order to see what the user has been, we must take the things which were used in the market, and which were offered for sale or shown in the market. When you look at that you must see what was used on those goods as the distinguishing mark.'"

I will now take these articles *seriatim*. First of all, I have the label on the bottle. That label on the bottle, it is now quite clear, was registered by itself as a trade-mark. Every word, letter, and figure, exactly as it is upon the bottle, appears in the *Trade Marks Journal* of the 13th of September, 1876, which states that it had been used "fifteen years or thereabout before the 22nd of March, 1876." So that, as to the label on the bottle, the statement of *Heidsieck & Co.* themselves on the 13th of September, 1876, in the *Trade Marks Journal*, was that, not the word "*Monopole*" alone on the label, but the whole of the label, with every word and figure upon it, had been used as their trade-mark for fifteen years or thereabout before the 22nd of March, 1876. It is impossible after that for *Heidsieck & Co.* to be allowed to say, "We used in the label on the bottle the word '*Monopole*' as our only trade-mark." They themselves say that their use is of the whole label as the trade-mark. They have registered it, and they have stated positively that it had been used as their trade-mark for fifteen years before 1876. That disposes of the label.

Now, let us take the cork. The cork could not be seen until the bottle was opened. It could not be seen at the same moment that the label was looked at. It could be seen by the consumer at the time he was consuming the wine. Therefore, I cannot take it as in any way modifying the label; and it is to be said in favour of Messrs. *Heidsieck & Co.* that, if the label had been "*Monopole*" alone, I should certainly have hesitated to say

that because there was something else on the cork which would be seen when the cork was drawn, that shewed that "*Monopole*" had not been used alone. But it has not been attempted really to press upon me that the use of the word "*Monopole*" by itself, or the words "*Dry Monopole*" by themselves, upon the cork alone, constituted a trade-mark. If you look at the cork you see that certainly on the side is the word "*Monopole*"; but just at the bottom, so that really you could not help seeing it if you looked at the word "*Monopole*," there is the figure of a comet and the words "*Heidsieck & Co.*" round it. It is impossible to say that is a use of the word "*Monopole*" alone as a trade-mark. The comet must have been a trade-mark. No one could deny that for an instant. Therefore, the word "*Monopole*" is used there in immediate conjunction with a comet, and the words "*Heidsieck & Co., Reims*," round it. I cannot therefore treat the cork as establishing the use of the word "*Monopole*" alone.

Now let us go to the other two classes of articles, the wrappers and the cases, upon which great stress has been laid. It was said on the part of the Plaintiffs, "Well, we may not have used the word '*Monopole*' alone as a trade-mark upon the bottles; we may not have done so upon the corks. We used it there in combination with other words and figures and another device; but, on the wrappers of the bottles, and on the cases in which the bottles are packed, '*Monopole*' was used as a trade-mark alone." In my opinion, it is a very strong position to take up to say, "I had used the word '*Monopole*' as part of a trade-mark which I registered in 1876, the rest of that trade-mark consisting of other words and figures; and yet I say that, because I put '*Monopole*' upon the wrapper by itself—if I did it—that is such a use of the word '*Monopole*' alone as entitles me to register that as a trade-mark." I should hesitate before I came to that conclusion if that point were so. But it is not so at all. On the wrapper the word "*Monopole*" never was used by itself. It was used in immediate conjunction with the words "*Heidsieck & Co., Reims*"; and again, I find in the *Trade Marks Journal* of 1876 the words "*Established* 1785, *Heidsieck & Co., Reims*," described as a separate trade-mark, and a statement that it has been used for "eight years or thereabout before the 22nd

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March, 1876." It is said, "Oh, but there '*Heidsieck & Co., Reims*,' was written in a peculiar running-hand character with various flourishes about it different from that which appears on the wrapper." That is so; it is slightly different, and therefore it is said that must be taken as a registration of that peculiar character of "*Heidsieck & Co., Reims.*" But that is out of the question, because it was not "*Heidsieck & Co., Reims*" only that was registered. *Heidsieck & Co.* say that the words "*Established* 1785" were also a part of the mark; and that therefore it cannot be said that using "*Monopole, Heidsieck & Co., Reims*," on the wrapper, without using the words "*Established* 1785," was a user of that trade-mark so registered. That may be so; but again Messrs. *Heidsieck* seem to me to have done their utmost to embarrass their own case, because, in 1882, they registered the words "*Heidsieck & Co.*" without "*Reims*," in ordinary type, without any peculiarity of any sort about it, shewing that they meant to treat, as they might have done, the name of their firm as a trade-mark. With regard to that, there is the decision of *Ainsworth* v. *Walmsley* (1) and other cases, which established before the passing of this Act that the name of a firm might perfectly well be added; and it is such a common-sense decision, if I may venture to say so, that I cannot conceive anybody doubting that for a moment. What does a "trade-mark" mean? The essence of a trade-mark is that it is some distinctive thing which points out that the goods are the goods of *A. B.* How could you point them out to be the goods of *A. B.* better than by putting *A. B.'s* name upon them? Therefore, it is clear that so long ago as 1882 "*Heidsieck & Co.*" was registered as the trade-mark, and it is said that that mark has been used by the applicants and their predecessors in business since 1785. Thus, they state that they have used their own name as a trade-mark since 1785.

Now, how can I possibly say that the purchaser of a bottle with this wrapper on it, "*Monopole, Heidsieck & Co, Reims*," would know that "*Monopole*" was the trade-mark and "*Heidsieck & Co., Reims*," was not? How can I say that? I should not know myself. If I were asked I should suppose that "*Monopole*" was a description of a special wine made by these gentlemen,

(1) Law Rep. 1 Eq. 518.

and that "*Monopole*" was never intended to be a trade-mark; and I should be strongly fortified in that view by knowing, as I do know now, that on some other wines they put, not "*Monopole*," but "*Dry Monopole*." Surely that meant some particular character of wine. Then on some others they put, "*Grand Vin Royal*" and "*Sillery Mousseux*." Therefore, it is clear enough that a purchaser buying a bottle of wine with that wrapper upon it would not know from that wrapper that "*Monopole*" was alone used there as the trade-mark. That is conclusive, because it is what the purchaser would know—not what the seller meant in his own mind—it is what the purchaser would know and judge was used as the trade-mark which must establish the user as a trade-mark of the word "*Monopole*" only.

Now I go to the cases. The cases were, after all, the things on which reliance was principally placed, and it is said—and quite truly—that on the cases there are other devices. On the cases the word "*Monopole*" appears on one side by itself, and on the end is the anchor with the words "*Heidsieck & Co., Reims*": that is a device plainly. We therefore have this, that upon every case there is not only the word "*Monopole*," but there is also the anchor device, and there are the words "*Heidsieck & Co., Reims*." Now, take the purchaser of a case—and I will suppose him to be a lawyer, an equity lawyer, intimately versed in the law of this Court—would he know which of those was the trade-mark? I should not. But supposing him not to be a lawyer, what would be his impression? Surely he would take the device to be the trade-mark. Now, if that is the test—as, to my mind, it certainly must be—that would not be such a user of the word "*Monopole*" as would make the public come to the certain conclusion that "*Monopole*" was the trade-mark, and "*Monopole*" only; and, again I repeat, when you have the words "*Dry Monopole*" upon some cases and "*Monopole*" upon others, how is the purchaser who knows of those two facts to suppose that in one case "*Monopole*" is the trade-mark, and in the other "*Dry Monopole*" is the trade-mark, and the only trade-mark? It seems to me quite impossible. Probably he would come to quite a different conclusion. I should myself suppose that "*Monopole*" on one and "*Dry Monopole*" on the other meant a sweet wine and a

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dry wine, or that one wine was drier than the other—that those words meant to refer to the particular wines manufactured by *Heidsieck & Co.*, and that they were not the trade-mark, but a mode of distinguishing from their other wines those particular wines; and I should be confirmed in that conclusion if I found upon the case the name of "*Heidsieck & Co., Reims,*" which might be used as a trade-mark, coupled with a device like an anchor with words around it, which is the kind of thing more commonly used as a trade-mark.

Therefore, it seems to me that the use on the case in this way, even if I disassociated it from the other ways in which the word "*Monopole*" has been used by these gentlemen, would not be such a use of the word "*Monopole*" as would establish in the public mind that that was the exclusive trade-mark upon those cases, or that that was the use of the word "*Monopole*" by itself as a trade-mark.

I will now proceed to consider the decision in *In re Spencer's Trade-marks* (1). It has been attempted before me to cut down the language of the Master of the Rolls, and an exceedingly ingenious argument was founded upon it by Mr. *Rigby*. He said: "True, the late Master of the Rolls in *Spencer's Case* did say that if part of a trade-mark was on a portion of the article and the rest was on a different portion of the article, that would make no difference; but those words must be read with reference to the facts of that particular case, and it was there established that there was a composite trade-mark consisting of a device and words, and that, by reason of the want of space, sometimes the device was put on one side of the goods and the words on the other, the words never being used without the device appearing also on some part of the goods." What the Master of the Rolls said in that case was this: "Therefore what was used before 1875 by this gentleman, was one distinguishing mark, which one mark was a combination of a mark which had been granted to his father by the *Cutlers' Company*, and a mark which he invented himself. The two together being put on his goods in order to distinguish his goods, that made it one trade-mark" [observe, it is the fact of both of them being put on the

(1) 3 Rep. Pat. Cas. 73, 74.

goods that made it one trade-mark, not the fact of their being put close together]. "And I do say this distinctly that whether the things which are put on to make a distinction (for that is all that is wanted) are put close together, or are put at two ends of the same goods, or are put one on one side of the goods and one on the other, if they are on the goods for the purpose of making a distinction they are one mark, and the mere fact that, on the files, they have been put on the two sides, does not make them separate marks—certainly not the separation which is relied on here—even though the name of the person is not a part of the mark." In that case there were two devices. They were sometimes put together, and sometimes they were put separately. Mr. *Rigby's* argument was that they were a composite trade-mark. I said to counsel: "What do you mean by a composite trade-mark? How do you compound a device and words?" Well, it was a little difficult to answer a question of that kind, I agree; but I tried to bring it, really for the sake of clearing my mind on the matter, to a concrete and definite point; so I asked, "Do you say that putting '*Monopole*' and the anchor device on the same side of the box would make them composite?" The answer was: "No, I do not admit that; one might be put in one corner and one in the other." Then I asked: "What makes them composite? Putting them close together—how is that composite?" What is composition? There can be no element of composition but proximity in the case of a mark; and it seems to me that proximity is enough (even if this were the point of the case, which I do not think it is), and that if one was put on the side and the other at the end, and they are put so that a man cannot tell which is the trade-mark, or whether they are both together the trade-mark, or one of them only, that is enough. In that case it seems to me it would not be such a user of the word as would entitle him to say, "I have used that word as my only trade-mark." To entitle him to say that, he must be able to say, "I have used it so that the public would understand it to be my only trade-mark." I should not so understand it from the use made on the box, nor do I think any of the public would. But I rather depend on the first point, on which my judgment mainly rests, as to the user on the box and the wrapper; and whether it

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be used with the other device and words or not, and whether you can fairly call them a composite mark or not, this, at least, to my mind, is clear—there has not been, upon the wrapper or upon the box, such a use of the word "*Monopole*," or the words "*Dry Monopole*," that a person who bought would believe either to be the trade-mark, and the only trade-mark, of the man using it. The consequence is that I am of opinion that these two trade-marks must be expunged from the register, and that the Defendants are entitled to the costs of this application.

G. I. F. C.

C. A.

From this decision the Plaintiff appealed The appeal came on for hearing on the 30th of April, 1891.

Sir *Horace Davey*, Q.C., *Rigby*, Q.C., *Renshaw*, Q.C., *Sebastian*, and *Pattisson*, for the Appellants :—

The Appellants have to shew that the expressions "*Monopole*" and "*Dry Monopole*" were "used as trade-marks," by them or their predecessors in business, before the passing of the *Trade Marks Registration Act*, 1875. The evidence shews that they were. Sect. 10 of the Act defines a trade-mark as being (*inter alia*) "Any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act."

It is said by the Defendants that the expressions in question were not so used alone, but always in combination with other matters. The matters relied upon by the Defendants cannot be considered as having formed part of the trade-marks which were used. For instance, the addition of the name and address of the firm selling the article which was indicated by the distinctive word cannot prevent that word from being by itself the trade-mark. How could a man advertise his goods by means of a trade-mark, unless he could add to the trade-mark his name and address? In all the cases relied on for the Defendants there was a composite mark, as in *Perry Davis & Son* v. *Harbord* (1). There is no composite mark in the present case. The guiding principle established by the cases is, that the question to be

(1) 15 App. Cas. 316.

considered is, whether that which has been registered is part only of that which has been used to distinguish the article or the whole of it: *In re Spencer's Trade-marks* (1). That case is really quite consistent with the Appellants' contention. It is a question of fact what the distinctive mark is—whether it is a composite mark consisting of several elements. If it is, part only of it cannot be registered. In the present case the words "*Monopole*" and "*Dry Monopole*," respectively, constituted the distinctive marks. There is a broad distinction between such a case as *In re Spencer's Trade-marks*, in which there was independent evidence that the distinguishing mark consisted of what was placed on both sides of the article, and the case of two marks, each used as distinctive marks, one of which is put on one side of the cases, and the other on the other side.

The words "*Monopole*" and "*Dry Monopole*" are "special and distinctive words," within the meaning of sect. 10. A "distinctive word" is one which distinguishes the manufacture or product of the person who claims the trade-mark from the manufacture or product of all other persons: *In re Wood's Trade-mark* (2); *Perry Davis & Son* v. *Harbord* (3). In *Bodega Co.* v. *Owens* (4), (an Irish case), Vice-Chancellor *Chatterton* said (5): "'Special,' in my opinion, must be construed as meaning words not ordinarily applied to goods of that class in respect of which they are used; 'distinctive' must be construed as meaning suitable for distinguishing the particular goods as to which they are used from other goods of the same class. It does not appear to me that a word or words, which have been used as a trade-mark before the Act of 1875, can be objected to as not being special or distinctive because such word or words are of a descriptive character. This seems to have been recognized in many of the cases where the use commenced after the Act of 1875."

In considering whether a word has been used as a trade-mark, it is important to see what was the intention of the person who used it: *Perry Davis & Son* v. *Harbord* (6). In the present case there is evidence of an intention to use the words

(1) 3 Rep. Pat. Cas. 73.
(2) 32 Ch. D. 247, 262.
(3) 15 App. Cas. 316, 320.
(4) 6 Rep. Pat. Cas. 236.
(5) Ibid. 241.
(6) 15 App. Cas. 316.

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"*Monopole*" and "*Dry Monopole*," respectively, alone as trade-marks. There may be one trade-mark within another. If it is held that the user on the cases is not sufficient to shew that the word "*Monopole*" has been used alone as a trade-mark, *In re Spencer's Trade-marks* (1) will be very much extended.

Sir *R. Webster*, A.G., *Aston*, Q.C., and *J. Cutler*, for the Defendants:—

The order appealed from has only struck out the words "*Monopole*" and "*Dry Monopole*" standing alone, on the ground that the Plaintiffs were seeking to obtain an exclusive right to those words, though they had never used them except in conjunction with other words. In 1876 they registered their whole label as their trade-mark, and they are not entitled now to say that the word "*Monopole*," or the words "*Dry Monopole*," are respectively the only material part. The original registration of 1876 is not affected by the order: the Plaintiffs are still entitled to use the labels which they then registered; they are only prevented from using the words "*Monopole*" and "*Dry Monopole*" alone. The words are only distinctive of one class of the Plaintiffs' wine from another class; they do not distinguish their wine from that of other traders.

[They were stopped by the Court.]

Sir *H. Davey*, in reply:—

The result of the argument for the Defendants is, that it will be almost impossible to register any word as a trade-mark. Every trader puts his name and address on his labels, and this is done for the purpose of shewing who is the manufacturer or producer of the goods. The registrar may have been wrong in 1876 in registering the whole label, but it does not follow that the Defendants are now entitled to have the registration of the words "*Monopole*" and "*Dry Monopole*" expunged.

LORD ESHER, M.R.:—

In the course of an action brought by the Plaintiffs to restrain the Defendants from infringing their registered trade-marks,

(1) 3 Rep. Pat. Cas. 73.

consisting of the word "*Monopole*" and the words "*Dry Monopole*," a motion was made by the Defendants, under the *Trade Marks Acts*, to expunge both those registered marks from the register, and Mr. Justice *Kay* has accordingly ordered them both to be struck off. The question is, whether we can say that he was wrong in so doing.

Now, these words were not properly placed on the register, and they ought, therefore, to be struck off, unless in the first case the one word was a "special and distinctive word," or, in the second case, the two words were "special and distinctive words," "used as a trade-mark before the passing of" the Act of 1875.

I will take first the one word, "*Monopole*." Whether that word was used as a trade-mark before that date does not depend upon its being registered as a trade-mark in 1876. I do not think that the registration in 1876 is of any importance except as evidence of prior user. The question is, whether the word was "used as a trade-mark" before the 13th of August, 1875. It is not simply whether the word was used by *Heidsieck & Co.*, it is whether it was "used as a trade-mark." That is a question of fact. The Plaintiffs say the word was used as a trade-mark. The Defendants answer, "It was never used 'as a trade-mark'; it was used with some other words, or with some other thing, as a trade-mark; it was never used alone as a trade-mark." Now, what constitutes the use of anything "as a trade-mark"? Not the mere use of it, but the use of it in a particular way, and with a particular result. You use the thing "as a trade-mark," if you use it in business, or, as is often said, in the market, as a mark to denote your goods, and to distinguish them from the goods of anyone else. You use it, not merely as a writing, but as a mark in the market, and you must shew that you used it in the market for the purpose of distinguishing your goods, and, I think, you must also shew that the market accepted it as a distinguishing mark of your goods—then you use it as your "trade-mark."

Now, that *Heidsieck & Co.* used the word "*Monopole*" in the market seems to be proved. But did they use the word "as a trade-mark"? It cannot be shewn that they ever used it by itself alone as a trade-mark, unless we can hold, as a matter of fact, that they so used it on their packing cases; in no other

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way did they use it alone. It is said that, although they did on the labels, which they placed upon their bottles, use the word "*Monopole*," and jointly with it "*Heidsieck & Co., Fournisseurs brevetés de S.M. l'Empereur d'Allemagne, Reims, Established* 1785," still all that came after the word "*Monopole*" was immaterial, and was not used as part of the trade-mark, but the word "*Monopole*" alone was used as the trade-mark. That, again, is a question of fact. Did the Plaintiffs use the word "*Monopole*," and that only, as the trade-mark intended by them to distinguish their goods, and was that word so accepted in the market?

What is the evidence? When you find that they placed all those words together on the labels on their bottles, what is the true inference to be drawn? I think that the same test as I ventured to apply in *In re Spencer's Trade-marks* (1) must be applied here. When these men of business desire to distinguish their goods in the market, what do they do? They put the word "*Monopole*" and the other words with it on their goods. Is the true inference that they meant "*Monopole*" alone to be their trade-mark, and not the other words? If so, why did they put the other words on the goods? If "*Monopole*" alone was their distinguishing trade-mark, the market did not want their name to be added. If "*Monopole*" by itself was their distinguishing trade-mark, it meant "*Heidsieck & Co.'s Monopole.*" Why, therefore, did they put all the rest on the goods? It is not the act of business men to take the trouble to add all the other words, which would be wholly unnecessary, unless they were to form part of their trade-mark. The truth is that they put all those words on their goods because they meant the whole to mark their goods, and to distinguish them; and, if that is so, the whole of it was the trade-mark which they used.

I may regard the case from another point of view. What is a trade-mark? It is not an essay; it is not a thing which it is necessary that people should read and construe. A word is capable of being a trade-mark, and I am inclined to think that the word "*Monopole*" by itself might be a good trade-mark, because it is a foreign word. No one would call English goods "*Monopole.*"

(1) 3 Rep. Pat. Cas. 73.

They would say in English, It is a monopoly. You want for a trade-mark something in the nature of a picture. But here the picture which was always put on the labels was not "*Monopole*" alone, but "*Monopole*" with something else added to it, and, unless a person read it carefully and construed it grammatically, he would only see a compound mark made up of many words and figures, and when he saw it he would say, that is *Heidsieck's* wine. If he saw other goods with only one word on the label, he would not stop to read it; he would say at once, "That cannot be *Heidsieck & Co.'s* label. Their label has not a short word like that on it. I will look for the picture which is always on their labels." Therefore, I think the true conclusion from the evidence is, that *Hiedsieck & Co.* used the whole of the words on their labels as their trade-mark. And I think the force of the evidence is immensely increased by their having registered the whole—not registering "*Monopole*" alone, but "*Monopole*" with "*Heidsieck & Co.*," and the rest; and, that having been placed on the register, I have not the slightest doubt that it was a picture, and nothing else, and that the whole of it was the registered trade-mark. It was a strong admission against themselves that they did not mean to rely, and that the market did not mean to rely, on the word "*Monopole*" alone, but that they relied on the whole as that which they habitually and invariably placed on their wines. This, I think, disposes of the first point taken on behalf of the Plaintiffs, and they cannot say that *Heidsieck & Co.* ever before 1875 used the word "*Monopole*" alone as a trade-mark, unless they did so on their packing-cases.

I doubt very much whether the use on the packing-cases can be treated as a use in connection with the goods. The packing-cases were not their goods. No customer bought the packing-case as part of the transaction; on the contrary, in all probability, the packing-cases were returned. What *Heidsieck & Co.* sold was the wine, not the packing-cases. But I will assume that, if the Plaintiffs could shew a use of the word "*Monopole*" separately on the packing-cases, that would be sufficient. But was there such a use? The packing-cases were never, in fact, sent out with the word "*Monopole*" alone on them. The word "*Monopole*" stood by itself on one side of the packing-case, but, when they used

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the word "*Monopole*" on one side, they never omitted to place on other parts of the packing-case the remainder of their registered label, and, moreover, they added an anchor. There, again, we come to *In re Spencer's Trade-marks* (1), and we must ask ourselves what is the true inference to be drawn, not by a refined lawyer, but by an ordinary buyer or seller? In that case it was argued that, when part was placed on one side of a file and part on the other side, the two parts were two separate trade-marks. But the Court thought that that was not the true view of it. So as to these packing-cases, I should ask whether they put the word "*Monopole*" on one end of the case as their trade-mark, and then took the trouble of putting the rest of the words on the other end for no reason at all? I come to the conclusion that they did not. I hold, as a matter of truth and fact, that they placed the whole of the words on the packing-cases (although they wrote them in a particular way) as their one trade-mark. It follows, therefore, that in no instance, either on labels, bottles, packing-cases, or corks, or anywhere else, did they ever use the word "*Monopole*" by itself as their trade-mark. They always used a combination of that word with other words. And, if that be so, they had not brought themselves within the terms of the Act of Parliament when they attempted to register "*Monopole*" by itself as a trade-mark, because they had never used that word as a trade-mark before the 13th of August, 1875. I think, therefore, this case is, I will not say governed by *In re Spencer's Trade-marks*, but that it is to be decided according to that mode of arriving at the truth, which was applied there, not because that is the legal and only mode of getting at the truth, but because *In re Spencer's Trade-marks* points out a sensible mode of arriving at the truth, which may well be used in all other cases to which the reasoning is applicable, and I think it is applicable to the present case. We are instructed, therefore, by *In re Spencer's Trade-marks* how to reason out the present case; and, having done so, I come to the conclusion, as a matter of fact, that the word "*Monopole*" was never used before 1875 by *Heidsieck & Co.* as their special and distinctive trade-mark. The same reasoning, of course, applies equally to the two words

(1) 3 Rep. Pat. Cas. 73.

"*Dry Monopole*," combined together. They were never before 1875 used by *Heidsieck & Co.* by themselves as their trade-mark. In my opinion, the decision of the learned Judge was right, and this appeal must be dismissed.

FRY, L.J.:—

We have to apply to the two expressions, "*Monopole*" and "*Dry Monopole*," the language of sect. 10 of the *Trade Marks Registration Act*, 1875, and to inquire whether those two expressions were "any special and distinctive word or words . . . used as a trade-mark before the passing of this Act." I will assume, without deciding the point, that the word "*Monopole*" and the words "*Dry Monopole*" are "special and distinctive," and I will proceed to consider whether the evidence shews that those expressions were used as trade-marks before the passing of the Act of 1875.

I will consider, first, for the sake of simplicity, the word "*Monopole*" alone. There have been produced before us four instances in which that word was used, all of these users being in connection with the same parcel of goods. In the first place, it was used upon the label of the bottle, and used as part of a label which contains in addition, not only the name of the firm, "*Heidsieck & Co.*," but their description as "*Fournisseurs brevetés de S.M. l'Empereur d'Allemagne*," "*Reims*," the name of the place where they carry on their trade, and the date of the establishment of their business, 1785. That is the label which it has been proved that *Heidsieck & Co.* for many years used upon their bottles. That was the label which in the year 1876 they registered as their trade-mark. I have no hesitation, therefore, in concluding that that label, and the whole of it, was their trade-mark so far as it was used as a label.

It is to be observed that sect. 10 speaks of the user of the word or words in question, not as part of a trade-mark, but "as a trade-mark," that is, as the entirety or whole of a trade-mark. Therefore, as regards the bottles, I come clearly to this conclusion, that the word "*Monopole*" was only part of the trade-mark which was in use by *Heidsieck & Co.* as a label before the Act of 1875, and it appears to me that the label on the bottles is

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the trade-mark to which the greatest importance is to be attached. It is most likely that you will find there the truth as to the use as a trade-mark, and for this reason, that obviously the packing-case, the paper wrapper, and the cork would all probably disappear before the bottle. They are not so permanent as the bottle. A large number of persons would see the label on the bottle, who would never see the packing-case, or the paper wrapper, or the obscure inscription on the bottom of the cork. But, nevertheless, those three things must be considered. First, then, with regard to the packing-cases. Undoubtedly the word "*Monopole*" was used alone upon one side of the packing-case, but at one end there was branded in the wood the anchor, the name of the firm, and the place at which they carry on their trade. Using my own judgment on a question of fact, if I had seen the box, without any further information on the subject, I should have unquestionably come to the conclusion that the trade-mark consisted of the anchor, the name of the firm, and their place of residence, which was printed round it in a circle, and, whatever weight I might have attached to the word "*Monopole*," I certainly should not have come to the conclusion that it was used separately as the trade-mark. If it had any importance at all, I should have thought it was either no trade-mark, or only part of the trade-mark. I have already said that I think the box is not the place where you would expect to find the real trade-mark, the box being a thing which would probably be thrown aside at some stage in the history of the wine. Whether the case generally travels into the hands of the retail customer, I do not know. There is no evidence on the point, beyond this, that the wine is imported into *England* in these cases. I should suspect that in a great many instances bottles are taken out and sold retail without the case by the wine merchant in *England*. In other instances the bottles are supplied to the customers in the original cases in which they come from *Reims*, and then no doubt the packing-case is thrown aside.

Then, with regard to the paper wrapper, there again we find the word "*Monopole*" in connection with the words "*Heidsieck & Co., Reims*," in precisely the same letters, printed in the same manner as we find it in the label on the bottles, and I should

have thought that that was a mere partial forecast of the label which you would expect to find on the bottle, and that the word "*Monopole*" was not used there exclusively as the trade-mark.

Then, when you come to the cork, you find that around the cork, towards the bottom, is printed the word "*Monopole.*" On the bottom of the cork we have, in the form of a circle, the words "*Heidsieck & Co., Reims,*" and the centre or middle space of the circle is occupied by a figure, which we are told represents a comet. I should have supposed that, if anything, the comet was there the trade-mark, and I should not have taken the word "*Monopole,*" written round the cork towards the bottom, for the trade-mark. It seems to me that it is against all common sense to suggest that the word as there written was used by itself exclusively as a trade-mark. Therefore, taking the evidence of these four things—the label, the packing-case, the paper wrapper, and the cork—I cannot find that the word "*Monopole*" was ever used by itself as a trade-mark. It seems to me always to have been used in conjunction with the name of "*Heidsieck & Co.,*" and the place of their business, and never used alone as a trade-mark. The utmost that can be said, as it seems to me, is, that it was used as part of a trade-mark.

The same thing may be said with regard to the expression "*Dry Monopole,*" and that, therefore, in my judgment, falls under the same conclusion. And I may add that the expression "*Dry Monopole*" seems to me to raise an additional difficulty in the way of the Appellants, because it shews that "*Monopole*" must represent some character or quality of the wine. I cannot imagine what the word "*Dry*" could mean as applied to a trade-mark. As applied to a quality of the wine, I can understand it; but then that seems to shew that it was used as a description of the wine, and not to distinguish the producer of the wine from all other producers of wine. It tends, therefore, to shew that the word "*Monopole*" itself so used is not "distinctive" in the sense of distinguishing the producers from all other producers.

In coming to the conclusion to which I have come, I think I am acting in exact accordance with the principles laid down—and laid down, if I may venture to say so, with absolute correctness—in *In re Spencer's Trade-marks* (1).

(1) 3 Rep. Pat. Cas. 73.

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LOPES, L.J.:—

Sect. 10 of the Act of 1875 provides that, "Any special and distinctive word or words, or combination of figures or letters, used as a trade-mark before the passing of this Act, may be registered as such under the Act." That section was considered by this Court in *In re Palmer's Trade-mark* (1). The headnote is as follows: "*P.* in 1876 registered 'braided fixed stars' as a trade-mark for matches, alleging that he had used it as a trade-mark before the passing of the Act. He also at the same time registered a label enveloping the boxes in which his matches were sold, which contained the words 'braided fixed stars' in two places so as to be conspicuous on each side of the boxes, but also contained a number of other words. It was shewn that, at the time when *P.* introduced the term 'braided fixed stars,' the term 'fixed stars' was known in the trade as denoting a particular class of fusees, and that he had just bought a patent for enveloping the stems of fusees with wire by means of a braiding machine. This patent expired in August, 1881. It appeared from the evidence that *P.* had not before the Act used 'braided fixed stars' separately as a trade-mark, or otherwise than as a part of the above-mentioned label. In October, 1881, an application was made by a rival trader to expunge the registration." It was held by the Court "that the registration must be expunged, for that to entitle *P.* to register these words as a trade-mark he must before the Act have used them as such alone, and not merely in conjunction with other words."

Applying that test to the present case, we have to consider whether these expressions "*Monopole*" and "*Dry Monopole*" were "special and distinctive words" used by themselves as a trade-mark before the Act of 1875. To that question I can give only one answer. It is clear that they were not used by themselves as a trade-mark—they were only used in conjunction with other things, which together with them made up and composed the trade-mark. In my opinion, this appeal must be dismissed.

Solicitors: *Nicol, Son & Jones; Stibbard, Gibson & Wills.*

(1) 24 Ch. D. 504.

W. L. C.

MANGAN *v.* METROPOLITAN ELECTRIC SUPPLY COMPANY.

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[1890 M. 1155.]

Practice—Trial by Jury—Action in Chancery Division—Rules of Supreme Court, 1883, *Order* XXXVI., *rr.* 6, 7.

A Plaintiff who had commenced an action in the Chancery Division for nuisance, applied for an order transferring it to the Queen's Bench Division, that it might be tried by a judge with a jury. *North*, J., before whom the case had been twice on motion for injunction, was of opinion that it had better be tried with a jury, and made the order. The Defendants appealed:—

Held, that as *North*, J., had made the order after considering the circumstances of the case, the Court of Appeal ought not to interfere with the exercise of his discretion, there being no reason for expecting a failure of justice from the action being tried in the way he directed.

Jenkins v. *Bushby* (1) explained.

THIS was an action commenced in April, 1890, in the Chancery Division for an injunction and damages. The Plaintiff had purchased a leasehold interest in a house, and was in occupation, and he alleged by his statement of claim that the Defendant company had erected buildings which interfered with the access of light and air to his house; that since August, 1889, they had made a great noise in the erection of their works; that they had fitted up in the buildings engines and dynamos for the generation of electricity; that the engines and dynamos were kept at work during the greater part of the day and night, and caused constant vibration and noise in the Plaintiff's house, and that the vibration had caused and would cause structural damage to the house; that the vibration and noises made it impossible to obtain any rest or quiet in the Plaintiff's house by night or day, and made it impossible for the Plaintiff to carry on his business of a lodging-house keeper.

The case came before Mr. Justice *North* on a motion for injunction, and an injunction was granted to restrain the noise caused by the erection of the buildings. The case came on again upon application for a further injunction, and a mass of affidavits

(1) [1891] 1 Ch. 484.

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was filed of the most contradictory description. The application for the further injunction was refused. After issue had been joined, the Plaintiff applied to have the action transferred to the Queen's Bench Division, that it might be tried by a judge with a jury, and Mr. Justice *North* made an order in Chambers accordingly. The Defendant company moved to discharge this order; but Mr. Justice *North* refused the application, considering the case to be one which would be best tried by a jury, there being a great conflict of evidence, and a jury being, in his Lordship's opinion, a much better tribunal than a judge for assessing unliquidated damages.

The Defendant company appealed.

Napier Higgins, Q.C., and *J. G. Butcher*, for the Appellants:—

The case is one in which the Plaintiff cannot claim a trial by a jury as a matter of right: *Jenkins* v. *Bushby* (1), where it is laid down that in such a case it lies upon him to shew that the action is one which ought to be tried by a jury. The case is not one of discretion, with which the Court of Appeal will not interfere. The normal mode of trial in a Chancery action is without a jury, and the Plaintiff must make out a case for having another mode of trial. If there is a discretion, it must be exercised on proper grounds. A conflict of evidence is no reason for having a jury, and unliquidated damages can perfectly well be assessed without one, so that there is no case for a jury made out.

Cozens-Hardy, Q.C., and *Percy Gye*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

We are in substance asked to tell Mr. Justice *North* to try this case himself, after he has determined that it is one which can be better tried by a judge with a jury. The action is an ordinary action on the ground of nuisance alleged to be caused by the noise and vibration of electrical apparatus set up by the Defendants. The Plaintiff says that not only is he disturbed by

(1) [1891] 1 Ch. 484.

the noise, but his premises are cracked and injured by the vibration. There have been two applications for an injunction; a limited injunction was granted, a subsequent application for a more extended one was refused. The Plaintiff now thinks that the case could be better tried by a judge with a jury than by a judge alone, and he applied for a transfer of the action to the Queen's Bench Division that it might be so tried. The application was granted, and Mr. Justice *North* has refused to discharge the order granting it. It is urged that the Plaintiff cannot claim a jury as a matter of right, and that Mr. Justice *North* has directed a trial by jury on insufficient grounds, having attached too much importance to the conflict of evidence and to the difficulty of assessing unliquidated damages without a jury. But Mr. Justice *North* has exercised his discretion after a full consideration of the circumstances, and we ought not to interfere unless satisfied that there is likely to be a failure of justice if we do not. We were pressed with the case of *Jenkins* v. *Bushby* (1). The Solicitor-General there urged that the Plaintiffs had a right to a trial by jury; that was decided against him. He then urged that there would be a miscarriage of justice unless there was a trial by a jury who could have a view. We thought that a view was essential to justice, and on that ground we interfered. Here I can see no reason to apprehend a failure of justice if the case is tried in the way which Mr. Justice *North* thinks the best, and I think the appeal ought to be dismissed, reserving the costs till we have seen the result of the trial.

BOWEN, L.J.:—

I come to the same conclusion and on the same grounds. I am not sure that, if I had been in the place of Mr. Justice *North*, I should have made the order he has made; but it is not desirable for us to examine the way in which the Judge below, who is familiar with the case, has exercised his discretion.

FRY, L.J.:—

I am of the same opinion. I should have been quite satisfied

(1) [1891] 1 Ch. 484.

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MANGAN v. METROPOLITAN ELECTRIC SUPPLY COMPANY.

if the Judge had retained the case to be tried by himself; but he thinks it better that it should be tried in the Queen's Bench Division. He knows the case, and has considered all the circumstances, and we ought not to interfere with the exercise of his discretion.

Solicitors: *Bircham & Co.; Capel Cure & Ball.*

H. C. J.

C. A.
1891
June 3.

MANDER *v.* FALCKE.

[1891 M. 1235.]

Injunction—Restrictive Covenant—Occupier.

The owners of the freehold reversion in a house sued *A.* and his son *B.* to restrain them from using the house in such a way as to break a restrictive covenant contained in a lease of it granted by the Plaintiffs' predecessor in title. The house was vested in *B.* for a term under an underlease which had been assigned to him. It was not shewn that *A.* had any estate legal or equitable in the house, but there was evidence to shew that he was in substance managing the business carried on there in which *B.* took part. *Kekewich*, J., came to the conclusion that *B.* was a trustee of the underlease for *A.*, and granted an injunction against both of them. *A.* appealed, alleging that he had no estate or interest in the house, and that an injunction could not be granted against him:—

Held, by the Court of Appeal, that the evidence shewed *A.* to be in joint or sole occupation of the house and to be managing the business in it with notice of the covenants, and that even if he was nothing more than a mere occupier he was liable to an injunction to restrain him from using the house in a way forbidden by the restrictive covenants.

THIS was an action by the landlords of a messuage No. 34, *Poland Street*, to recover possession on the ground of breach of covenant, and for an injunction to restrain the Defendants from using the premises, or permitting them to be used as a brothel or disorderly house, or from otherwise permitting or committing breaches of the covenants contained in the lease.

The lease was granted on the 23rd of December, 1858, by the Plaintiffs' predecessor in title, and was a lease for thirty years from the 25th of December, 1868, at which time a then existing lease would expire. The lease contained a covenant not to do or

cause or permit to be done upon the premises anything which might grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises or of the adjoining property of the lessor or of the occupiers thereof.

The Defendants were *D. Falcke*, in whom the residue of the term was vested, and *George Edward Hinde* (sued under the name of *Edwards*), as the occupier of the premises. *George William Hinde*, the son of *George Edward Hinde*, was afterwards added as a Defendant.

The case made by the Plaintiffs was that the premises which were ostensibly used as an oyster bar and refreshment rooms, were in fact notoriously used as a brothel to the great annoyance of the neighbourhood.

It appeared in evidence that in September, 1889, *George William Hinde* had purchased the residue of a term in the premises created by an underlease of the 22nd of December, 1875. There appeared to be reason to believe that *G. W. Hinde* was a minor, but there was no distinct proof of it.

The Plaintiffs gave notice of motion for injunction. *Falcke* gave an undertaking in terms satisfactory to them, and the injunction was only moved for against the other Defendants. *G. Edward Hinde* set up the case that he had no interest in the premises, and had nothing to do with the management of the business. The evidence satisfied the Court that the house was used for immoral purposes, and there was evidence shewing that *G. Edward Hinde* took such a part in the conduct of the business that he must be treated at all events as one of the persons carrying it on. Mr. Justice *Kekewich* thought that the result of the evidence was that the son must be considered trustee of the underlease for his father, and his Lordship granted an injunction restraining the two *Hindes*, their servants and agents, from using or permitting the premises or any part thereof to be used as a brothel or disorderly house, or from doing, causing, permitting, or suffering therein anything which might grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises or the adjoining property of the Plaintiffs or the occupiers thereof.

George Edward Hinde appealed.

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Oswald, for the Appellant:—

My case is that the father who appeals had nothing to do with the property and cannot be sued in respect of it. An injunction against using a house in a particular way cannot be granted against a person who has no interest in the house, he must have some estate legal or equitable in it, or else he cannot be sued.

[BOWEN, L.J.:—Is a person who goes into a house with notice of an agreement that it shall not be used in a particular way in a better position as regards that agreement because he has no title?]

I contend that he is, the leading case as to enforcing restrictive covenants is *Tulk* v. *Moxhay* (1), and the principle of it is explained by Lord Justice *Cotton* in *Hall* v. *Ewin* (2) as being that a person who buys an interest in land with notice of a restrictive covenant regulates his price accordingly, and it would be inequitable to allow him to use the land in a way forbidden by the covenant. Here the Appellant neither acquired the land nor any interest in the land. He is not even the person in occupation, but if he were I contend that that would not be enough. Mr. Justice *Kekewich* referred to *Tritton* v. *Bankart* (3), but there a person bound by a restrictive covenant promoted a breach of it. The Court can only interfere on the ground of contract: *Warne* v. *Routledge* (4), and there must be a clear contract. If there is no legal right to one there is no right to an injunction: *De Francesco* v. *Barnum* (5). The Plaintiffs must therefore shew that the party sued is bound by the restrictive covenants and can be sued on them.

Warmington, Q.C., and *Gatey*, for the Plaintiffs, were not called on.

LINDLEY, L.J.:—

This is an appeal by *George Edward Hinde* from an injunction restraining him and his son, *George William Hinde*, from using, or permitting certain premises to be used, as a brothel or dis-

(1) 2 Ph. 774.
(2) 37 Ch. D. 74-79.
(3) 35 W. R. 474.
(4) Law Rep. 18 Eq. 497.
(5) 43 Ch. D. 165.

orderly house, or from doing, causing, permitting, or suffering therein anything which may grow to the annoyance, damage, injury, prejudice, or inconvenience of the premises or of the adjoining property of the Plaintiffs. The Plaintiffs are the freehold reversioners of the house in question. A lease of it was granted by their predecessor in title, and the Defendant *Falcke* is entitled to the benefit of this lease, subject to an underlease, which, in 1889, was assigned to *George William Hinde*, who has not appealed. The father appeals on the ground that he has nothing to do with the property. Now, what the business relations between the father and son are is very obscure. Whether the father acquired the underlease in the son's name is uncertain, but that the father has much more to do with the business carried on in the house than he wishes us to believe appears to me quite clear. After perusing the affidavits, I have not the slightest doubt that the father is substantially the person interested in the business, and that the son is put forward as a screen. I have no doubt that the father is managing the house; and that he does so with full notice of the terms on which the son holds the property. I feel certain that he has a pecuniary interest in the concern. I do not proceed on the hypothesis that he is *cestui que trust* of the underlease, for that is uncertain. I treat him simply as an occupier managing the business. He may be neither an assignee nor purchaser, but he is in occupation, and that is enough to affect him, he having notice of the covenants in the lease. I have not followed all the cases from *Tulk* v. *Moxhay* (1), but in *Wilson* v. *Hart* (2) it was held that a tenant from year to year was bound in equity by a restrictive covenant of which he had express notice, and though I cannot say that it has been decided that a mere occupier is in the same position, I am satisfied on principle that a simple occupier comes within the decision of Lord *Cottenham* in *Tulk* v. *Moxhay*. The appeal will be dismissed.

BOWEN, L.J.:—

I am of the same opinion. This is an interlocutory application, and it is not necessary finally to determine what is the

(1) 2 Ph. 774. (2) Law Rep. 1 Ch. 463.

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interest of the father in the premises; but it is to my mind quite clear that the dealings of the son with the premises are intended to cloak the real interest of the father. I suspect it will turn out that the father is the real owner of the underlease; but I do not decide upon that ground. I think we should be allowing ourselves to be hoodwinked if we did not act on the view that the father is in possession, either jointly with the son, or solely by permission of the son. If a man by the leave of a person who is bound by a restrictive covenant as to the use of land enters into possession of the land with notice of the covenant, he will be restrained from violating that covenant. Why should not a person who enters into possession of land for his own convenience, and by the permission of a person bound by a restrictive covenant, be as much bound as a tenant from year to year? We ought to extend the principle to such a case, if our holding it so to apply is in fact an extension.

FRY, L.J.:—

I am of the same opinion, and agree that the appeal is ill-founded.

Solicitor for Appellant: *T. Dyson.*
Solicitors for Plaintiffs: *Ellis, Munday, & Clarke.*

H. C. J.

In re ROBSON.
ROBSON *v.* HAMILTON.

CHITTY, J.
1891
May 6, 7.

[1890 R. 704.]

Will—Construction—"Contents of Desk"—Choses in Action—Key of a Strong Box—Intention of Testator.

A testator gave his desk "with the contents thereof" to his nephew *J.*; he also gave him a legacy of £200, and made him one of his executors and residuary legatees; the desk contained bank notes and coin, a banker's deposit receipt, a cheque to the order of the testator, but unindorsed, divers promissory notes, payable to the testator or order, also unindorsed, a promissory note payable on demand, and the key of a tin box in which some securities were kept. It was admitted that the bank notes and coin passed to the nephew *J.*, but the residuary legatees contended that the *choses in action* did not pass:—

Held, that by the desk and its "contents" the testator intended to pass all that was found therein at the time of his death, and that the words used were sufficient to pass all the *choses in action*, including those which were negotiable only after indorsement by the executors:

Held, also, that the key of the security box gave no title to the contents of that box.

Roberts v. *Kuffin* (1) discussed and distinguished.

Effect of *In re Prater* (2) on the older authorities stated.

ADJOURNED SUMMONS.

Joseph Robson, of *Corbridge, Northumberland*, who died in December, 1887, by his will made in the previous November, after appointing his four nephews—of whom *Joseph Robson*, the Plaintiff, was one—and his niece executors and trustees, gave and bequeathed to his said nephew *Joseph Robson* "my old mahogany desk with the contents thereof, my double leaved mahogany table, and Dr. *Adam Clark's* Commentaries," and after making various specific bequests of books, furniture, and plate to his other nephews and nieces, devised and bequeathed all his real estate, and all the residue of his personal estate, to his said trustees, upon trust for sale and conversion, and out of the proceeds of such sale the testator gave numerous pecuniary legacies, including one of £200 to his said nephew *Joseph Robson*, and then gave the ultimate residue to his said nephews

(1) 2 Atk. 112. (2) 37 Ch. D. 481.

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and nieces, including the said *Joseph Robson*, in equal shares as tenants in common.

The old mahogany desk, referred to in the will, turned out to be an old-fashioned secretaire, with a flap or lid, which, when closed covered pigeon-holes and small drawers, and when let down formed a writing-table; the lower part consisted of drawers, which were filled with wearing apparel. It was admitted that this piece of furniture was the "desk" referred to by the testator. After the death of the testator, the secretaire, when unlocked and opened, was found to contain *Bank of England* notes for £20, silver coins amounting to £2 1*s.* 3*d.*, a banker's deposit receipt for £60, a promissory note payable on demand for £50, a cheque for £4 to the order of the testator, but unindorsed, and five promissory notes payable to the order of the testator amounting to £615, and also unindorsed; the secretaire also contained the key of a tin box in which the testator kept other securities, some old papers, and other articles of no appreciable value.

It was admitted that the *Bank of England* notes and coin passed to the Plaintiff under the words of the gift, but the residuary legatees contended that the rest of the securities, being *choses in action*, some of which did not confer a title on the bearer, did not pass.

Whitehorne, Q.C., and *Levett*, Q.C., for the Plaintiff:—

It is very usual to keep money, notes, and securities for money, such as promissory notes and deposit notes, in a desk of this kind, and the expression "with the contents" is sufficient to pass the *choses in action* to the Plaintiff.

[CHITTY, J.:—I see Lord *Hardwicke* in *Roberts* v. *Kuffin* (1) refers to "a cabinet or bureau, or any other thing where money is usually kept."]

Though *choses in action* have no locality, they will pass under words such as the testator has used here, if it is plain that it was the intention of the testator to include them: *In re Prater* (2). And the intention of the testator is quite plain. A gift of the

(1) 2 Atk. 112. (2) 37 Ch. D. 481.

contents of a desk or of property at a bank is quite different from a bequest of chattels in a house, and the cases on this point collected in *Theobold* on Wills (1) do not apply.

[They were then stopped.]

Byrne, Q.C., and *Ingle Joyce*, for the Residuary Legatees:—

We admit that the bank notes and coin passed; but the *choses in action*, which were put into this desk for preservation and safe keeping, will not pass under a gift of the chattel: *Godolphin's* Orphan's Legacy (2). A gift of chattels in a house will not pass *choses in action*, which are nothing but the evidence of title to property elsewhere: *Green* v. *Symonds* (3); *Moore* v. *Moore* (4); *Fleming* v. *Brook* (5); *Stuart* v. *Marquis of Bute* (6); *Brooke* v. *Turner* (7); *Marquis of Hertford* v. *Lord Lowther* (8). These authorities have not been overruled by *In re Prater* (9), and are still binding and in point.

[*Chapman* v. *Hart* (10) was also referred to.]

The case is distinguishable from *In re Prater*, and though the words may, after that case, be sufficient to pass the *choses in action* payable to bearer, they are not sufficient to pass those payable to the order of the testator, which must be indorsed by the executors before they can be enforced. The words "the contents" may be satisfied by coin, notes, and promissory note to bearer, independently of the *choses in action*, which we say do not pass. The testator gave the Plaintiff this specific article of furniture and the table among the other gifts of furniture to his other nephews, he also gave him a legacy of £200 and a share in the residue, but he never intended by the gift of the "contents of the desk" to give the Plaintiff £750 more than the other legatees.

Levett, in reply.

CHITTY, J. (after reading the bequest and stating the will and

(1) 3rd Ed. p. 145.
(2) Page 417.
(3) 1 Bro. C. C. 129, n.
(4) Ibid. 127.
(5) 1 Sch. & Lef. 318.
(6) 11 Ves. 657, 662.
(7) 7 Sim. 671.
(8) 7 Beav. 1.
(9) 37 Ch. D. 481.
(10) 1 Ves. Sen. 271.

CHITTY, J. 1891

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the facts, briefly referring to the contention of the Plaintiff and of the residuary legatees, continued):—

The only question I have to decide is whether the *choses in action* found in the desk passed to the Plaintiff under the gift of the desk and its contents. There is no question on the authorities that have been referred to that, as a general rule, a gift in a will of goods and chattels in a house will not pass *choses in action*; that proposition is rightly admitted by the Plaintiff's counsel, but I have to decide whether those authorities have any application to the case before me, or have such an application as to require me to decide that *choses in action* will not pass under this gift. The testator had, besides this desk, a tin box in which he kept some securities. Now, by way of illustration of this case, I will suppose that the testator had given that tin box "with the contents thereof," meaning, by exposition, "with the things found therein at the time of my death." It appears to me in that case the intention of the testator would be so plain that the Court would say that *choses in action* of the class found in the mahogany desk were intended to pass, and, therefore, would pass, because in all these cases when the Court, from the language of the testator, can see an intention that the things should pass, it gives effect to such intention. Beyond that the Court is not required to consider the matter; and it is needless for me to observe that the construction that may have rightly been put on other words in other wills would not necessarily, at the present day, govern the construction of the particular will before the Court.

I am of opinion that by this gift of the mahogany desk, with the contents thereof, the testator did intend to give whatever was found therein at the time of his death. If the security box had been given with the contents thereof, it would have been absurd, to my mind to take out all the valuable things which were found therein, and to say in substance that an empty box with any chattel put there by the testator, a lead pencil or the like, was all that was intended to pass. I think that "with the contents thereof" does not mean the pens and ink and paper, and is not confined to mere chattels within the chattel. There is a distinction between a gift of chattels in a house and a gift of the

contents of a desk; a desk being the kind of thing in which men do usually keep valuable things. There is no question of fact in this case how the things that were found in the desk at the testator's death came to be placed there. On the evidence, I am satisfied that it was the testator himself who put these things in the desk.

I have observed during the argument upon the risk that men run in making bequests of this kind. During a man's last illness, some person honestly, finding valuable things lying about, might put them into a chest or desk, or the like, for the sake of safety, and there would be a question whether those things—not put there by the testator's direction, or by his own hands—passed or not; and, moreover, it seems to me an unwise thing for a testator to make a gift in this way, because one moment he may take the thing out and another moment he may put it in. The only advantage, if it be an advantage to him, is, that he can from time to time be making the gift a better gift or a worse gift, or no gift at all. The same observation of course applies, but with less force, to a gift of a balance at a banker's at the time of death, which is an uncertain gift depending upon the event; and it may be that nothing passes under such a gift by reason of there being no balance. But in this case, as I have said, I think that the words the testator has used are strong enough, and, properly construed, ought to be held to include all the *choses in action*. The *choses in action*, if any distinction is to be taken, are such as could have been given by the testator by mere delivery as a *donatio mortis causa*. In that case the indorsement of the executors would be required, and in this case the indorsement of the executors will also be required. It does happen that the legatee is also one of the executors, and his indorsement would be sufficient. That, I think, is not a material point, because if these things are given, as I think they are, then the executors are bound, as in the ordinary case of a specific legacy, because, although this is a gift of general things as they exist at the death, yet it is a specific legacy from the moment of the death, and the executors are bound to do that which is required to get the legacy in, and hand it over to the legatee. Of course they would all be bound, therefore, to put their

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signatures, or allow one to put his signature, which would be enough, in point of law, to enable the legatee to recover upon the promissory notes or the other instruments.

I do not propose to go through the authorities beyond mentioning two. I take the case of *Roberts* v. *Kuffin* (1), which was before Lord *Hardwicke* in the year 1740. The gift there was to the testator's daughter of "all goods and things of every kind and sort whatever which shall be found in her closet at the time of his death." The question was whether £45 0*s.* 7*d.* in money, which was found in the closet at his death, could pass to the daughter by that gift. The later cases, and, in fact, some of the earlier decisions, had decided that money would pass; that is to say, coin of the realm and bank notes would pass under similar gifts to this; but those authorities do not appear to have been cited to the Lord Chancellor. Whether if they had it would have made any difference to his opinion I need not consider. At any rate, he held that this £45 0*s.* 7*d.* would not pass, but he had there a context—it was "goods and things"—and he considered that the meaning of the word "things" was to be cut down by reference to the goods, and also by reference to the closet and the things which would usually be kept in a closet. But he made an observation in giving his judgment which has a bearing upon the case before me. He said (2): "Besides in the clause which is in dispute, goods are first named, therefore the subsequent word 'things' must be confined to household goods and what is of the same species, for it would be unnatural to extend it to money." Then comes the passage which has a bearing on the case before me: "The testator would have certainly mentioned cabinet or bureau, or any other thing where money is usually kept, if he had intended a further bequest of money." From that observation I infer that the Lord Chancellor would have been of an entirely different opinion if there had been a gift of a cabinet or bureau and the contents thereof, or, to use another expression, of the things found therein at the time of the testator's death. The other case is a recent decision of the Court of Appeal (3), *In re Prater*, where

(1) 2 Atk. 112. (2) 2 Atk. 113.
(3) 37 Ch. D. 481.

the gift was of "half my property at Rothschild's Bank." The Lord Chancellor and the Lords Justices decided that *choses in action* would pass, although it is true that they were *choses in action* which apparently did not require more than the delivery to the legatee of the documents themselves. The Lord Chancellor, in giving judgment, appears to give the ground upon which he proceeded by saying as he did at the end of his judgment (1): "I think that by the language which he used, he intended to describe whatever the bank had of his, and which on his demand they would have been bound to give up." It is not necessary for me, nor would it be right, that I should go through the reasoning. I am not quite sure whether in some of the reasoning the distinction whether the gift is a gift of a thing as it exists at the time the will is made, or whether it is a general description of the things which may be found in a particular state at the time of his death, was closely considered; but this observation has no effect whatever upon the judgment itself, and I think the effect of the judgment is that the Court of Appeal felt themselves less trammelled than was formerly the case by gifts of this description; and although the Court of Appeal have not overruled the old distinction, taken in the numerous cases which have been cited before me, some of which were also before the Court of Appeal, as to *choses in action* and gifts of chattels in a house or the like, yet I think that the effect of this judgment is to leave me, at any rate, unfettered in ascertaining, as I have endeavoured to do, the true intention of the testator, without reference to some of the older and subtler distinctions which were allowed to prevail. The result, therefore, is that I think that all the *choses in action* passed to the Plaintiff.

With regard to the key of the tin box, in which the testator kept other securities, which was also found in the desk, that key does not pass, because it was only the accessory to the other box; and as the box was not given, and consequently did not pass, it would be unreasonable to suppose that the key itself passed as part of the property. The distinction is, to my mind, just the same as would have prevailed if this desk had contained title-deeds, because I should not have held that the title-

(1) 37 Ch. D. 485.

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deeds passed, for the simple reason that the land to which the title-deeds related itself would not have passed—the land would have gone to the devisees under the will; or, if there had been no devise of land, it would have gone to the heir, and the deeds, in such a case, are the accessories to the title to the land. The result, therefore, would have been that, necessarily, an exception would have prevailed against the legatee in this case taking the deeds, which would have gone to the person to whom the land belonged, either by virtue of the will, or by virtue of the general law; and that would be in accordance with good sense, because nothing would be more absurd than to impute to any testator the eccentric intention of dividing the title-deeds from the land.

Solicitors: *Satchell & Chapple*; *Bell, Brodrick & Gray.*

W. C. D.

In re CUNNINGHAM AND FRAYLING.

STIRLING, J.

1891

April 21.

[1891 C. 140.]

Trust for Sale—Power to appoint new Trustees—Exercise by Heir—"Acting Trustee"—"Bare Trustee"—Land Transfer Act, 1875 (38 & 39 *Vict.* c. 87), s. 48.

By a deed executed in 1836, real estate was vested in *W. D.* and *T. P.* in fee, upon trust that they "or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee for the time being," should sell the same. The deed provided that if any of the trustees thereby appointed should die, it should be lawful for "the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee," to appoint new trustees.

T. P., who survived *W. D.*, died intestate in 1855, leaving *T. H. P.* his heir.

T. H. P. died intestate in 1857, leaving *T. S. H. P.* his heir.

T. S. H. P. died intestate in 1876 (and therefore after the coming into operation of the *Land Transfer Act*, 1875), leaving three daughters, *A.*, *B.*, and *C.*, his co-heiresses.

A., *B.*, and *C.* never received the rents, or otherwise acted in the trusts, till 1890, when they executed a deed purporting to appoint *X.*, *Y.*, and *Z.* new trustees, and to vest the trust estate in them.

X., *Y.*, and *Z.* contracted to sell part of the trust estate:—

Held, on the authority of *In re Morton and Hallett* (1), that *A.*, *B.*, and *C.* could have executed the trust for sale, and that they were "the trustees for the time being":

Held, also, that having acted when called upon to do so, by appointing new trustees, *A.*, *B.*, and *C.* were "acting trustees"; and that *X.*, *Y.*, and *Z.* could make a good title:

Held, also, that *T. S. H. P.* was not a "bare trustee" within sect. 48 of the *Land Transfer Act*, 1875, and that the legal estate passed to *A.*, *B.*, and *C.*

The definition of a "bare trustee," stated by *Hall*, V.C., in *Christie* v. *Ovington* (2), preferred to that stated by *Jessel*, M.R., in *Morgan* v. *Swansea Urban Sanitary Authority* (3).

By indentures of lease and release, dated respectively the 22nd and 23rd of November, 1836, certain real estate was conveyed unto and to the use of *William Dwelly* and *Thomas Penny*, their heirs and assigns, upon trust that the said *William Dwelly* and *Thomas Penny*, or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee

(1) 15 Ch. D. 143. (2) 1 Ch. D. 279.
(3) 9 Ch. D. 582.

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for the time being of the settlement, should, with all convenient speed, and without the consent or concurrence of any other person or persons whomsoever, sell and dispose of the settled premises or any part or parts thereof. The release contained a proviso that, if any of the trustees thereby appointed should depart this life, or decline to act in the trusts thereby in them reposed, then and in such case it should and might be lawful to and for certain persons therein mentioned (all of whom died without appointing new trustees), and the survivors and survivor of them, and, after the death of such survivor, to and for the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying or declining to act, and that thereupon the trust estate should be vested in the new trustees.

William Dwelly died in December, 1849.

Thomas Penny died intestate (so far as regards trust estates) in January, 1855, leaving *T. H. Penny*, his eldest son and heir-at-law, surviving.

T. H. Penny died in November, 1857 (intestate as to trust estates), leaving *Thomas Stephen Horatio Penny*, his eldest son and heir-at-law, surviving.

T. S. H. Penny died intestate in 1876, leaving three daughters, *Charlotte Matilda Penny*, *Emma Bird*, and *Clara Ann James*, his co-heiresses-at-law, surviving.

From 1856 the rents of the trust property were collected by the husband of one of the *cestuis que trust*, and divided, without the intervention of any trustee, and, save and until the execution of the deed of the 7th of June, 1890, mentioned below, no one entitled to act as trustee in succession to *T. H. Penny* acted in the trusts.

By a deed dated the 7th of June, 1890, *C. M. Penny*, *E. Bird*, and *C. A. James*, in exercise of the powers of the deed of the 23rd of November, 1836, and of all other powers, if any, them thereunto enabling, appointed *G. Cunningham*, *A. J. Hammonds*, and *E. A. Hammonds*, trustees of the settlement, and declared that the trust estate should forthwith vest in the new trustees in fee simple, upon the trusts of the settlement.

On the 26th of June, 1890, the new trustees sold a part of the settled estate by auction to *E. S. Frayling*, who objected that the appointment of new trustees was not made by the acting trustees of the settlement.

The new trustees then took out a summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that the deed of the 7th of June, 1890, was a good and valid appointment of themselves as trustees, and that as such trustees they had power to sell.

This summons was adjourned into Court.

H. F. Laves, in support of the summons:—

The three co-heiresses of *T. S. H. Penny* were either continuing trustees—in which case they had power to appoint new trustees under the *Conveyancing and Law of Property Act*, 1881, s. 31, sub-ss. 1 and 6—or acting trustees, in which case they could exercise the power of appointment given by the settlement. They were certainly trustees capable of exercising the trust for sale. When a deed declares that if the original trustees die the trustees or trustee for the time being shall have power to appoint new trustees, the trust for sale may be executed by the heir of the surviving trustee: *In re Morton and Hallett* (1). If trustees, they were acting trustees, for they exercised the power of appointing new trustees.

Warrington, for the purchaser:—

The settlement gives the power to appoint new trustees to the acting trustees, or the personal representatives of the last acting trustee, but not to the heirs of the last acting trustee. The three co-heiresses never accepted the trusts, and had, therefore, no need to retire from them. *T. S. H. Penny* died after the date of the commencement of the *Land Transfer Act*, 1875. He had no beneficial interest in the property, and was, therefore, at most a "bare trustee" within sect. 48 of the Act: *Morgan* v. *Swansea Urban Sanitary Authority* (2). Sir *George Jessel*, M.R., in that case, declined to accept the opinion of *Hall*, V.C., that a "bare trustee" means "a trustee to whose office no duties were originally

(1) 15 Ch. D. 143. (2) 9 Ch. D. 582.

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attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in Equity to convey the estate to them, or by their direction": *Christie* v. *Ovington* (1). On the death of *T. S. H. Penny*, therefore, the trust estate vested in his legal personal representative. [He referred also to *In re Docwra* (2).]

Lawes in reply.

STIRLING, J.:—

This case raises a question of law which it is not very satisfactory to have to decide as between vendor and purchaser.

[His Lordship stated the effect of the deed of the 23rd of November, 1836, down to the end of the power to appoint new trustees, and continued:—]

Thomas Penny, the survivor of the original trustees, died intestate. His son and heir also died intestate; and *T. S. H. Penny*, the son and heir of that son, died intestate in 1876, leaving three daughters, his co-heiresses-at-law. These three ladies executed a deed, dated the 7th of June, 1890, whereby they purported to appoint the vendors trustees of the settlement, and the question raised is whether that deed was a valid exercise of the power of appointment contained in the deed of the 23rd of November, 1836.

In the first place, it is said that *Charlotte Matilda Penny*, *Emma Bird*, and *Clara Ann James* were not "the acting trustees or trustee for the time being." Now, according to *In re Morton and Hallett*, the heir-at-law of the last surviving trustee who has the legal estate can exercise a trust for sale. Here there has been no assignment of the legal estate, and I assume in the first instance that it accordingly descended to *Charlotte Matilda Penny*, *Emma Bird*, and *Clara Ann James*, as co-heiresses-at-law of *Thomas Stephen Horatio Penny*. If the legal estate in the property devolved upon them, they were in a position to exercise the trust for sale. It is quite plain, from the judgment of *Jessel*, M.R., in the case of *In re Morton and Hallett* (3), that he

(1) 1 Ch. D. 279, 281. (2) 29 Ch. D. 693.
(3) 15 Ch. D. 143.

thought that where there is a trust of this kind, and a power is given to the trustees or trustee for the time being to appoint new trustees, the heir-at-law of the last surviving trustee can execute that power. He says (1): "Who are the 'trustees or trustee' who are to appoint, if both the named trustees die? Someone: and I cannot find any one except the heir of the survivor, or the person or persons having the personal estate. Then there is a direction for the transfer of the trust estate to the new trustees. It appears to me that the testator has contemplated the possibility of both the named trustees dying, and of someone calling himself a trustee appointing new ones. If that were wanted, that shews that in using the words 'trustees or trustee' in his will, the testator must have intended to include the heir of the survivor of the named trustees; but I should have come to the same conclusion without that clause." Here, therefore, the legal estate having vested in the three co-heiresses, who are persons capable of executing the trust, it seems to me that they fall within the designation of "trustees or trustee for the time being" in the power to appoint new trustees contained in the settlement. But, to be in a position to exercise that power, they must be "acting trustees." I am told that they have received no rents from the property; but I find them here exercising the power of appointing new trustees, which is evidence of their acting. Their not having received the rents is not irreconcilable with this; because prior to exercising the power of appointment they may not have been called upon to act in the trusteeship. It merely amounts to this—that down to a certain time they did not act, but that they did act, when called upon. I think, therefore, they are "acting trustees" within the meaning of the power.

Then the point remains to be decided which was argued by Mr. *Warrington*, viz., whether, having regard to sect. 5 of the *Vendor and Purchaser Act*, 1874, and sect. 48 of the *Land Transfer Act*, 1875, the legal estate vested in the three co-heiresses of *T. S. H. Penny*. There are conflicting opinions of *Jessel*, M.R., and *Hall*, V.C., as to the meaning of the term "bare trustee" within these sections. I regret that it should fall to me to have to decide

(1) 15 Ch. D. 147.

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which of these opinions is to be preferred; but, as I have to form my own opinion on the subject, I must state that I think the view of *Hall*, V.C., is to be preferred. I understand him to say that a trustee who has active duties to perform, although he has no beneficial interest in the trust property, is not a "bare trustee" within the meaning of those sections. It is obvious that in *Morgan* v. *Swansea Urban Sanitary Authority* (1), though it was not necessary for his decision, Sir *George Jessel* intimated his opinion to the contrary. He said (2): "I should have thought that a 'bare trustee,' or a 'naked trustee,' meant a trustee without any beneficial interest." Being of opinion, however, that the view of *Hall*, V.C., is preferable, and more in accordance with the general opinion of the profession, I hold that *Thomas Stephen Horatio Penny* was not a bare trustee, and that the legal estate devolved upon these ladies as his co-heiresses. I have already held that they were acting trustees; they had therefore power to appoint new trustees, and the appointment which they made was valid.

I therefore hold that the summons is well-founded, that the new trustees were validly appointed, and that they have made out a good title to the property.

Solicitors: *Meredith, Roberts, & Mills*, agents for *Hunt, Hodson, Bobbett, & Castle, Bristol; Torr & Co.*, agents for *W. H. Atchley, Bristol.*

(1) 9 Ch. D. 582. (2) 9 Ch. D. 585.

F. E.

KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY *v.* LANE FOX ELECTRICAL COMPANY.

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April 24.

[1891 K. 187.]

Patent—Agreement by Patentee to Assign—Action by Patentee for alleged Infringement—Subsequent Threats by Person entitled to Assignment—Injunction to restrain Threats—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 32, 46, 87.

A patentee agreed in writing in July, 1890, to assign his patent to the *L. Company.* In November, 1890, the patentee commenced an action against the *K. Company* for alleged infringement. In February, 1891 (pending the patentee's action), the *L. Company* sent letters and circulars threatening customers of the *K. Company* with liability for an alleged infringement.

The *K. Company* then commenced an action under sect. 32 of the *Patents, Designs, and Trade Marks Act,* 1883, against the *L. Company* for an injunction to restrain such threats:—

Held, that the fact of the patentee's action being pending did not entitle the *L. Company* to the benefit of the proviso that the section "shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent"; and that the *K. Company* were entitled to an interlocutory injunction against the company.

ON the 9th of October, 1878, letters patent, numbered 3988 of 1878, were granted to *St. George Lane Fox* for "Improvements in obtaining light by electricity, and in conveying, measuring, and regulating the electric current for the same, and in the means or apparatus employed therein."

The specification was filed on the 9th of April, 1879, but was subsequently amended by disclaimer and memorandum of alteration.

At the time of the motion mentioned below, *St. George Lane Fox* was the registered owner of the patent; but he had, by an agreement dated the 31st of July, 1890, agreed to assign the patent to the Defendants, the *Lane Fox Electrical Company, Limited,* upon terms which did not appear in evidence.

From the returns made to the Registrar of Joint Stock Companies by the Defendants and other evidence, it was shewn that the nominal capital of the company was £100 divided into 100

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shares of £1 each; that, on the 30th of June, 1890, 100 shares had been taken up, but nothing had been called up thereon, though £1 had been considered and agreed as paid upon the 100 shares; and that *St. George Lane Fox* held seventy-three of the shares, and was the managing director of the Defendant company.

On the 15th of November, 1890, an action (1890 L. 2713) was commenced by *St. George Lane Fox* against the Plaintiffs, the *Kensington and Knightsbridge Electric Lighting Company, Limited,* to restrain them from infringing his patent, and this action was pending at the time of the motion.

John Barker, who was being supplied with electricity by the *Kensington and Knightsbridge Electric Lighting Company,* received a letter, dated the 21st of February, 1891, from the *Lane Fox Electrical Company,* as follows:—

"We understand that your house is being supplied with electric light by the *Kensington and Knightsbridge Electric Supply Company,* which company, as you are doubtless aware, is now being sued for damages for infringement of our patented system of electric distribution. We have been advised that you, as one of the users of the said system of distribution, are liable for the infringement. We beg, therefore, to caution you of the fact, and to offer you an indemnity upon the terms contained in the enclosed circular. These terms, however, are to be considered as withdrawn if not accepted by the 28th inst."

The circular was as follows:—

"The *Lane Fox Electrical Company, Limited,* by whom all Mr. *Lane Fox's* patents for his system of electric light distribution are now held, are prepared to grant licenses for the use of this system on the following terms, provided they are accepted without delay"; the document then stated the terms, and concluded with a short description of the *Lane Fox* system and a reference to the above-mentioned patent.

On the 4th of March, 1891, the present action was commenced, the Plaintiffs claiming "an injunction to restrain the Defendants from threatening any persons with legal proceedings or liability in respect of any alleged infringement of the Letters Patent No. 3988 of the year 1878," and damages.

The Plaintiffs served notice of motion for an injunction till the trial or further order to restrain the Defendants, their shareholders, servants, and agents from threatening the Plaintiffs, their customers, or any other person or persons with legal proceedings or liability in respect of any alleged infringement of the above-named letters patent.

Documents similar to the above-named letter and circular had also been received by other customers of the Plaintiffs.

Hastings, Q.C., and *Roger Wallace*, in support of the motion:—

The Defendants claim to be entitled to the patent, and their letter and circular amount to a threat of "legal proceedings or liability," entitling the Plaintiffs to an injunction under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883 (1). The evidence shows a *primâ facie* case of non-infringement.

J. C. Graham, for the Defendants:—

St. George Lane Fox is the registered owner of the patent; but in equity it belongs to the Defendants. If the threats had been uttered in his name, the case would have been within the proviso to the section, for no injunction is granted to restrain an action for threats where an action for infringement has been commenced before the threats: *Barrett* v. *Day* and *Day* v. *Foster* (2).

[STIRLING, J.:—The Defendants are not the legal owners of the patent, and the statute is very precise as to the persons who are to bring the action.]

The Plaintiffs cannot be in a worse position by being threatened by the Defendants than they would be if threatened by the

(1) Sect. 32: "Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent" (46 & 47 Vict. c. 57, s. 32).

(2) 43 Ch. D. 435, 446.

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patentee. The object of the section is not to determine who are the proper parties as plaintiff and defendant, but that the question of validity and infringement shall be tried when threats are held out: *Challender* v. *Royle* (1). Here a *bonâ fide* action is pending, in which the questions of validity and infringement will be tried. The *onus* lies on the Plaintiffs; but they have not established a case justifying an interlocutory injunction. The patentee and his witnesses consider there has been an infringement of his patent, and the evidence altogether amounts only to a conflict of opinion.

[Sects. 46 and 87 of the *Patents, Designs, and Trade Marks Act*, 1883, were also referred to (2).]

STIRLING, J.:—

This is a motion, made under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883, which is in these terms:—[His Lordship read the section, and continued:—]

The action is brought to restrain threats, of which a sample has been put in evidence. It is the letter dated the 21st of February, 1891 [which His Lordship read.]

I think, upon the construction of that letter, there is no doubt that it contains a threat. The circular which is enclosed is as follows:—[His Lordship read the portion of the circular above set out, and continued:—]

Upon that it seems to me that the *Lane Fox Electrical Company, Limited*, by whom the letter of the 21st of February, 1891, is signed, claim to be the patentees of this invention within the meaning of sect. 32. In the circular they describe themselves

(1) 36 Ch. D. 425.

(2) Sect. 46: "'Patentee' means the person for the time being entitled to the benefit of a patent" (46 & 47 Vict. c. 57, s. 46).

Sect. 87: ". . . The person for the time being entered in the register of patents designs or trade-marks, as proprietor of a patent, copyright in a design or trade-mark as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, license, or dealing: Provided that any equities in respect of such patent, design, or trade-mark may be enforced in like manner as in respect of any other personal property" (46 & 47 Vict. c. 57, s. 87).

as "*The Lane Fox Electrical Company, Limited*, by whom all Mr. *Lane Fox's* patents for his system of electric light distribution are now held," and therefore, according to the definition of "patentee" in sect. 46, they claim to be the persons "for the time being entitled to the benefit of a patent."

Then, by sect. 32, these persons claiming to be patentees of the invention, and by circular threatening legal proceedings, any person aggrieved may bring an action against them. Are the Plaintiffs persons aggrieved? They are engaged in operations for supplying various persons within a particular district of *London* with the electric light, and upon the evidence there is no doubt at all that these threats interfere with their operations, and prevent them from being so effectively conducted as they otherwise would be. The Plaintiffs are therefore persons aggrieved, and they can bring an action and obtain an injunction "if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats." Have the persons who make the threats, in this case the Defendant company, any legal rights to prevent the infringement of this patent?

The only light which is thrown upon that is by the affidavit of Mr. *Lane Fox*, the original patentee, who says that he is the inventor of the invention protected by the Letters Patent No. 3988 of 1878, referred to in this action, and is still the registered owner thereof, though he has, by agreement dated the 31st of July, 1890, agreed to assign the said patent to the Defendant company. Therefore, so far as appears at the present time, the Defendant company, the persons making the threats, are not the owners of the patent, or entitled to the benefit of it. They are simply entitled to the benefit of an agreement for the assignment of that patent to themselves upon some terms the nature of which is not disclosed and which may not have been complied with by the company and may never be. It would seem that no formal assignment has been executed such as would enable the company to sue, because Mr. *Lane Fox* has brought an action in his own name for the infringement of the patent.

Now, some of the documents which the Defendants, being a limited company, are compelled by the provisions of the

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Companies Act, 1862, to register with the Registrar of Joint Stock Companies, have been put in evidence, and it appears that the constitution of this company is somewhat remarkable. The nominal capital of the company consists of £100, divided into 100 shares of £1 each. On the 30th of June, 1890, all these shares had been taken up; there had been called up on those shares *nil*; and there was "considered as paid" on each of those shares £1. Mr. *Lane Fox*, one can understand, may have very good reasons for not being eager to clothe that company with the legal title which would enable them to sue in respect of the infringement of the patent. At all events, there is no evidence that he has done so; and it seems to me that the conclusion I ought to arrive at, upon the evidence before me, is, that the company have no legal title, but are simply entitled to an equity such as is referred to in the concluding sentence of sect. 87 of the Act, which provides that "any equities" in respect of a patent "may be enforced in like manner as in respect of any other personal property"; that is to say, if they desire to enforce their rights, they must bring an action against Mr. *Lane Fox*, and get him to complete the contract to which he refers as having been made on the 31st of July, 1890.

It appears to me, therefore, that the Defendant company, the persons making the threats in the language of the statute, have no legal rights of which the acts of the Plaintiffs can be an infringement. Then there is the proviso at the end of sect. 32, "that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent." Now, "the persons making such threats" are the Defendant company; but they have commenced no action. It is true that an action for infringement has been commenced; but it has been brought by the legal owner of the patent, Mr. *Lane Fox*, who is not the person making the threats. So that, if any damages are at the trial proved to have been occasioned to the present Plaintiffs by the threats which have been used, those damages will not be recovered from Mr. *Lane Fox* at all, who is the person suing for infringement, but from the company with a nominal capital of £100, which is to be considered as fully paid up. I think, under those circumstances,

that the Plaintiffs bring themselves within the section, and that without entering into the question of the validity or invalidity of the patent, or whether the acts of the Plaintiffs are such as would entitle the legal owner of the patent to complain, the Plaintiffs are entitled to an injunction to restrain the Defendant company, their officers and servants, from threatening the above-named Plaintiffs, or any of their customers, or any other person or persons, within the district of the Plaintiff company.

Graham:—The order does not point to *St. George Lane Fox* personally.

STIRLING, J.:—No. I cannot restrain him, except so far as he is acting in his capacity as an officer of the company. If he threatens on his own account, that is another matter.

Solicitors: *Deacon, Gibson, & Medcalf; Sydney Morse.*

F E.

KEKEWICH, J.

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Company—Winding-up—Reconstruction—Contract making Shares payable by Instalments—Determination of Contract—Right of Liquidator to make Immediate Call—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 38, 98, 102 [*Revised Ed. Statutes, vol. xiv., pp.* 203, 211, 224, 225].

A company was formed for the purpose of carrying into effect a contract for the purchase of the business of an existing company. Under this contract (which in due course became binding on the new company) shareholders in the old company were entitled to shares in the new company, and payments in respect of such shares were to be made by certain specified instalments. Several shareholders in the old company accepted shares in the new company under the contract. Before the periods fixed for payment of some of the instalments had arrived, the new company was wound up:—

Held, that the contract for payment by instalments was determined by the winding-up, and that, by virtue of sects. 7 and 102 of the *Companies Act*, 1862, the liquidator was entitled to make an immediate call for the amount remaining unpaid in respect of the shares.

ADJOURNED SUMMONS.

The *Cordova Union Gold Company, Limited*, was duly registered under the *Companies Acts* with a capital of £200,000 in £1 shares.

The company was incorporated with a memorandum and articles of association, and was established for the purpose of acquiring and purchasing the business, property, and undertaking of the *Union Gold Company, Limited*, and, in particular to adopt and carry into effect an agreement dated the 8th of October, 1888, between the *Union Gold Company, Limited*, of the one part, and an agent on behalf of the *Cordova Union Gold Company* of the other part.

By this agreement (which was scheduled to the articles of association of the *Cordova Company*), it was provided that any member of the *Union Gold Company* should, in respect of each share held by him on which 20*s.* stood credited on the books of that company as having been paid up, be entitled to require the *Cordova Company* to allot to him one £1 share in that company, with the sum of 15*s.* credited as having been paid up thereon, and in respect of each share held by him in the *Union Gold*

Company on which less than 20*s.* stood credited in the books of that company as having been paid up, one £1 share in the *Cordova Company* with three-fourths of such lesser sum credited as having been paid up thereon, and that the sum remaining to be paid up on each share to be allotted by the *Cordova Company*, should be payable to that company as follows:—1*s.* a share, and such further sum as would entitle the allottee to be credited as having paid up 16*s.*, on application; 1*s.* per share on the 1st of February, 1889, and 6*d.* per share on each of the following dates: the 1st of August, 1889, the 1st of February, 1890, the 1st of August, 1890, the 1st of February, 1891, the 1st of August, 1891, and the 1st of February, 1892.

The agreement was duly adopted and confirmed by the *Cordova Company* on the 17th of October, 1888.

Many shareholders in the *Union Gold Company*, in response to a circular sent to them, applied for shares in the *Cordova Company* upon the terms of the agreement, and such shares were allotted to them accordingly.

On the 3rd of February, 1890, a petition asking for the compulsory winding-up of the company, was presented; on the 15th of March, 1890, the winding-up order was made, and an official liquidator was afterwards appointed.

The liquidator settled on the list of contributories 201 persons, holding 66,216 shares, on which the total liability was £3310 16*s.*

The liquidator considered that the mode of payment for shares provided for by the agreement of October, 1888, was determined by the winding-up order; and by the present summons, dated the 20th of February, 1891, he applied to the Court for an order that a call to the amount of 1*s.* per share might be made in respect of the two instalments of 6*d.* per share payable under the terms of the allotment, on the 1st of August, 1891, and the 1st of February, 1892, respectively, such call to be made on all the contributories except those who might have paid in advance the first of such instalments, and for a call upon such latter contributories of 6*d.* per share.

This application was opposed on behalf of sixteen contributories holding 3640 shares.

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Warmington, Q.C., and *Ashton Cross*, for the liquidator:—

The language of sect. 102 of the *Companies Act*, 1862, is express that calls may be made on contributories "to the extent of their liability," that is, to the extent to which the amounts of their shares have not been paid up. The official liquidator, therefore, is not bound to have regard to the special bargain between the shareholders and company whereby balances due on shares were to be paid by instalments. When the winding-up order is made, new rights arise. Thenceforth the only remedy in respect of the breach of any such contract as that in question must be against the company in damages.

Rawlins, for the contributories opposing the application:—

This case is not within sect. 102, but if it is, the Court, in the exercise of its discretion, will not sanction this immediate call. The scheme of the Act is that a shareholder by taking shares becomes liable to pay the whole nominal amount of his shares. As to the amount, the Act is explicit, but the time of payment is not defined. If the whole amount unpaid became a debt immediately upon the winding up taking place, the word "call" would be inappropriate; such a debt would not require calling, but simply collecting. In the present case the shares were part of the price which was paid by this company for the property which it purchased from the old company. It was an essential part of the contract of sale and purchase that the payments in respect of the shares should be deferred. There is nothing in the *Companies Act*, 1862, to prevent such a bargain from being carried out. In *Waterhouse* v. *Jamieson* (1) it was held that the liability of a shareholder is to be measured by his contract as based upon the statutory documents, which are registered for the purpose of protecting the shareholders on the one hand, and the creditors on the other, and that the Court will not fix upon a shareholder any engagement larger or other than that into which he entered; his contract, as it existed at the time of the winding up, being the sole measure of his liability.

(1) Law Rep. 2 H. L., Sc. 29.

KEKEWICH, J.:—

This company is being wound up by the Court, and the present application is made by the official liquidator in order to enable him to discharge his duty to the Court and those whom he represents. The matter may be important, because, putting out of sight any question which might arise of a like character to those arising in a voluntary winding up, the contributories represented by Mr. *Rawlins* say in answer to the application for calls, "We stand by our contract; we are prepared to pay what the contract obliges us to pay, and at the times mentioned in the contract. There is no suggestion that we are in any way playing false; but we are not liable to pay, and unless the Court makes the order we decline to pay, in advance of the days named in the contract."

That contract is to be found in the agreement under which the company purchased their property. As a matter of fact, it was purchased under a scheme for the reconstruction of another company. But that is quite immaterial. They acquired their property on the terms of issuing shares to certain persons, including Mr. *Rawlins*' clients. According to the agreement of purchase, the shares which Mr. *Rawlins*' clients took as part of the purchase-money were to be paid by certain instalments; and without going through the articles of association, which expressly confirm this contract, I take it that all these articles must be construed with reference to the contract, and that, unless the persons who had the benefit of the contract were expressly bound by a confirming clause, the articles would have to be construed as preventing the company from demanding payment in respect of these shares otherwise than in accordance with the contract. That contract I regard as being to all intents valid and perfectly clear, but it seems to me that it is a contract intended to endure during the life of the company, and having no application after its dissolution—I mean dissolution in the sense of a winding-up by the Court, for, of course, the company is still in existence. And I think so for this reason. The Legislature has thought fit to interfere and to say that not only shall companies have powers of winding-up similar to those which every partnership has, though controlled by the

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Court, but there shall be also, in the interests of the creditors, a power in the Court to direct a winding-up by the Court, and when that is done new rights supervene. There is no occasion to go back and trace the history of the Winding-up Acts; but, if my recollection is right, the first Act which introduced the rights of creditors in the ordinary winding-up of a joint-stock company was the Act of 1856. But whether that be right or not, nearly forty years ago the Legislature thought fit to intervene in favour of the creditors. From that time until now the winding-up by the Court has been a winding-up in which, through an officer of the Court—the official liquidator—creditors have, independently of the ordinary rights of creditors to sue the company, a right which enables them to insist upon the assets being realized and distributed equally among them, so as to pay them rateably, so far as the assets extend; and that right, having so supervened, seems to me to be a determination of this contract made to endure during the life of the company. The Court is constantly dealing with contracts made by a company, enduring during its life, and intended to continue without limit. Contracts between a company and its manager might be mentioned as an instance, unless limited, as such contracts generally are, to a term of three, four, or five years. A better instance, perhaps, is to be found in contracts to supply goods to the company. Such contracts are binding on the company during its life, and are equally binding after its dissolution, in this sense, that the contracting parties can sue the company for damages. But in so suing the company for damages it has never been suggested, and could not be suggested, that the company, as a matter of fact, is bound to accept the goods or employ the manager after the winding up has taken place. The complete breach of the contract is a necessary element of the case, and damages are assessed on that hypothesis. I might press that further, but it is not necessary to do so.

Mr. *Rawlins* says that the contract has this peculiar character that the company have purchased the property on the faith of their issuing shares to his clients, the price for which they were to pay at certain times. That is so. But I cannot see that that makes any difference. They must be taken to have

sold their property and taken their shares, with knowledge of the legislative provisions of the Act of 1862, and if those legislative provisions defeat their contract after the dissolution of the company, they are defeated, notwithstanding that their rights were expressly stipulated for, and were binding during the life of the company. It frequently happens that an ordinary vendor of property to a company takes his purchase-money in shares, and sometimes those shares are not taken as fully paid up, but carry with them a liability notwithstanding that the vendor may have stipulated that they shall not be paid up for a certain number of years. That is, of course, merely an illustration and not an argument, because it is the same case as Mr. *Rawlins* is arguing here, but I point to it as shewing that if the argument that this is a bargain by which the company acquired their property, were to prevail, it might have an extensive operation, and might defeat the rights of creditors, under the legislative provisions to be found in sect. 102 of the *Companies Act*, 1862, which enables the Court "to make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability." Unless that argument can successfully go so far as to shew that they are not liable for the money, a call may be made on these gentlemen for it. Mr. *Rawlins*' argument is not that the contributories whom he represents are not liable for the money, but that they are not liable *in præsenti*, but at a future time. I turn to sect. 7 of the Act, which defines the liability of members, or, in other words, those persons who are for the time being settled on the list of contributories, and I find that "the liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." I think I must read those words into the 102nd section, where it says that calls may be made to the extent of the liability of the contributories. The extent of the liability of the contributories is that fixed by the memorandum of association,

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which may be of such a character as is mentioned in sect. 7, but of no other extent except so far as it may possibly be varied under subsequent Acts of Parliament, as regards guarantee and so forth. The limitation of the amount is the limitation of the liability for its non-payment: if they have not paid that sum of money, for that sum they are liable, and for that the Court may make a call upon them. If I am right in the view that the contract which was entered into with these contributories must be deemed to endure only during the life of the company, except for the purpose of justifying an action or claim for damages, and that the power given by the Legislature supervenes and is exerciseable notwithstanding the contract—then, I think, it follows that the official liquidator is right in saying that the amount which he is empowered to call up is that which remains unpaid, and for which the contributories are liable.

Then Mr. *Rawlins*' last hope was in an appeal to the discretion of the Court. He says that the Court may make a call, but will not under the present circumstances. The Court is bound to see the creditors paid. The word "may" in sect. 102 may not be equivalent to "shall," but it is a near approach to it. So far as discretion goes, I should not exercise it in favour of Mr. *Rawlins*' clients, when many persons in the same position have taken different views. It would be extremely hard on them to say that the sixteen who have fought and failed are to get off and not pay because the Court is merciful. For the same reason I think that the costs of the application must be paid by these respondents.

Solicitors: *Arthur Heiron; H. Fereday.*

C. C. M. D.

JONES *v.* MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY.

WILLIAMS, J.

1891 May 27, 28, 29; June 1.

[1890 J. 158.]

Agreement—Validity—Illegal Consideration—Stifling a Prosecution.

The secretary of a building society who had made default and was threatened by the society with a prosecution for embezzlement, applied for assistance to the Plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the Plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes to the society. The Plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society:—

Held, that it was an implied term of the agreement that there should be no prosecution, that the agreement was founded on an illegal consideration and void, and that the promissory notes ought to be set aside.

Ward v. *Lloyd* (1) and *Flower* v. *Sadler* (2) explained and distinguished.

THE Plaintiffs, *Thomas Elias Jones* and *Catherine Jones* his mother, were respectively the brother-in-law and mother-in-law of *John Cadwaladr*, deceased. They resided at *Talysarn, Carnarvonshire.*

The Defendants were the *Merionethshire Permanent Benefit Building Society*, which was incorporated under the *Building Societies Act*, 1874, and established at *Blaenau-Festiniog, Merionethshire*, in 1877.

The object of the action was to set aside two joint and several promissory notes signed by the Plaintiffs in favour of the society for £200 and £150 respectively and certain collateral securities. *John Cadwaladr* was the secretary of the society from the time of its incorporation in 1877 until March, 1889. It was a part of his duty as such secretary to keep the accounts of the society.

Early in 1889, the attention of the directors was called to certain discrepancies in the accounts of the society.

(1) 6 Man. & G. 785. (2) 10 Q. B. D. 572.

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At a board meeting held on the 26th of February, 1889, the auditor of the society reported that there was a sum of £149 carried on against one *John Ellis*, a mortgagor of the society, whereas on the 31st of December, 1882, a sum of £110 had been paid in discharge of this mortgage, and the mortgage had been discharged by the secretary, and the seal of the society affixed to the discharge on that day. In obedience to instructions from the directors, the solicitor of the society, Mr. *G. H. Ellis*, demanded an explanation from *Cadwaladr*, and in answer thereto, *Cadwaladr* stated that he felt sure that the money had never come to his hands, and he undertook to make good the amount. Early in March he paid £110 into the society's bank.

After this incident, the directors caused a thorough investigation to be made of the books of the society throughout the whole period of its existence. The result of the investigation shewed that *Cadwaladr* had received from various persons and omitted to pay over to the society several sums for subscriptions and otherwise, amounting in all (exclusively of the £110), to £626 2*s*. At a board meeting held on the 22nd of March, after the result of the investigation was known, it was resolved to suspend *Cadwaladr* from his office of secretary pending further inquiries, and it was further resolved that *Cadwaladr* should be allowed to inspect the books of the society in the auditor's presence, but not in his absence.

At a board meeting held on the 30th of March, it was resolved that Mr. *G. H. Ellis* should be instructed to prepare securities to cover the amount due from *Cadwaladr* to the society, and it was further resolved that certain particular securities which were specified in the resolution, should be accepted. These securities included the following; "Mother-in-law and brother-in-law, as sureties for £400." There was no evidence as to the circumstances under which this security was proposed.

At a board meeting held on the 2nd of April, it was resolved that *Cadwaladr* should be allowed until the 6th to pay the sum of £400, and should be required to give security for £200.

On the 3rd or 4th of April, *Cadwaladr* sent his son to *Talysarn* to ask the Plaintiffs to help him out of his difficulties, but they declined to give him any assistance. On the 4th of April,

Cadwaladr's son wrote at his father's dictation, a letter to the Plaintiff, *Thomas Elias Jones*, to the following effect:—

"Dear Uncle,—After I returned home from you father was greatly disappointed in learning that you would not help him in any way at the present crisis, as he says it is now come to an end with him, as Saturday next, the 6th inst., is the last day the directors have fixed for him to pay the amount specified, and no grace will be got from them, as he says there is nothing to meet him on Saturday night next but the jail if you will not try and do something. Father says the directors are all against him, and he is certain that they will begin criminal proceedings on Saturday next. He has offered them every scrap of all he has, but they require £400 more, and he has no other than you and *Nain* to apply to for help. Try your best and do something for us as children, as if they will take him up none of us can raise our heads up. He is very sorry, but he cannot write himself owing to that bill being unpaid at the bank, and so he has asked me to write for him (and not merely for him, but for all of us). Again I must ask you, do try and arrange somehow to help my father out of this extreme crisis and all of us will be very glad, and it will be to himself and all of us a great blessing. I must now conclude by hoping and trusting you will help us.

"I am yours faithfully,

"*J. R. Cadwaladr.*"

On the 5th of April, after the receipt of this letter, *Jones* went over to *Festiniog*, and took with him two bill papers signed in blank by his mother, and also a bundle of deeds belonging to his mother. On the 6th of April, *Jones* accompanied *Cadwaladr* to the office of Mr. *G. H. Ellis*, where a board meeting was to be held at four o'clock. After some time they were called in to the meeting, and *Jones* offered on behalf of himself and his mother to pay to the society the sum of £176 2*s.* in cash, and to secure payment of a further sum of £350 by two promissory notes and the deposit of certain title deeds. This offer was accepted. The record of the transaction in the minute-book stated that it was "resolved that the offer made by Mr. *Thomas Elias Jones* for securing the payment of £526 2*s.* (part of the amount due from

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Mr. *Cadwaladr* to the society) be accepted, on the express condition that Mr. *Cadwaladr* execute a promissory note for £100, another part of the amount due from Mr. *Cadwaladr*." The minutes went on to state that certain named directors had been requested to complete the transaction with Mr. *Cadwaladr's* sureties. In the evening of the same day these directors called at *Cadwaladr's* house, accompanied by a clerk of Mr. *G. H. Ellis*.

At this interview *Jones* signed on behalf of himself and his mother a written undertaking which had been prepared in Mr. *Ellis's* office since the meeting in the afternoon. It was addressed to the society, and was in the following terms:—

"In consideration of your not suing Mr. *John Cadwaladr*, of *Blaenau Festiniog*, chartered accountant, to recover the sum of £526 2*s*., being part of a sum of £626 2*s*. being the whole amount owing by him to you, we undertake to see you paid the sum of £526 2*s*. in the manner following, viz., in cash amounting to £176 2*s*., and the remainder to be secured by two promissory notes (one for £200, and one for £150), and also interest thereon at the rate of 5 per cent. per annum, to be payable on demand and executed by us." At the same time he paid over to the directors £176 2*s*. in cash, and after filling in the bill forms with the dates and the amounts, and adding his signature in compliance with the terms of the undertaking, he handed the completed instruments to the directors. He also deposited with the directors the deeds which he had brought with him from *Talysarn*, as collateral security for the sums secured by the promissory notes.

A few days later a duplicate copy of the undertaking was signed by both Plaintiffs.

The Plaintiffs took security from *Cadwaladr* for the sum for which they had made themselves responsible to the society.

On the 16th of July, 1889, *Cadwaladr* died intestate.

In January, 1890, the society brought two actions in the Queen's Bench Division against the Plaintiffs on the promissory notes, but these actions were transferred to the Chancery Division to be tried with the present action upon payment by the Plaintiffs to the society of £370, the society undertaking to repay the amount to the Plaintiffs if the Court should so order, and

upon delivery by the society to the Plaintiffs of the deeds deposited with the society as collateral security.

The Plaintiffs claimed a declaration that the promissory notes and the collateral security were invalid, and that they were entitled to retain the deeds free from any charge or incumbrance; delivery up of the notes for cancellation; repayment of the £370, with interest.

The Defendants pleaded that the directors had no belief that their secretary had been guilty of fraud, and that they never threatened or intended to take criminal proceedings against him.

The facts found by the Court upon the evidence were as follows:—That *Cadwaladr* had embezzled the funds of the society; that the directors recognised the defaults of *Cadwaladr* as defaults arising from his criminal use of their funds, and that they threatened to prosecute him; that the threats uttered by the directors were communicated by Mr. *G. H. Ellis* to *Cadwaladr's* son and also to his sister-in-law, one Mrs. *Williams*; that the directors had no communication whatever with the Plaintiffs in which they mentioned any threats of prosecuting *Cadwaladr*; that at the board meeting of the 6th of April the directors made no promise in words to the Plaintiff, *T. E. Jones*, that they would not prosecute *Cadwaladr*; that *Cadwaladr* in applying to his relations for assistance mentioned to them that unless he obtained the requisite sum by a certain day the directors intended to prosecute him; that the Plaintiffs in coming forward were actuated by their fear that the directors intended to prosecute, and that their motive was known to the directors.

Jelf, Q.C., and *H. Terrell*, for the Plaintiffs:—

The securities were given in consequence of the Defendants' threats of criminal proceedings, and are void according to the well-known principle of *Collins* v. *Blantern* (1).

Haldane, Q.C., and *W. D. Rawlins*, for the Defendants:—

Where a felony has been committed, it is not illegal for the defaulting debtor or his friends to arrange to make good the default, in the absence of any intention on the part of the

(1) 1 Smith's L. C. 9th Ed. 398.

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contracting parties to stifle a prosecution. Here the agreement is quite free from any such intention: *Ward* v. *Lloyd* (1); *Flower* v. *Sadler* (2).

[VAUGHAN WILLIAMS, J., referred to the *Windhill Local Board of Health* v. *Vint* (3) and *Keir* v. *Leeman* (4).]

Jelf, in reply:—

Any contract or engagement having a tendency, however slight, to affect the administration of justice is illegal and void: *per* Lord *Lyndhurst*, in *Egerton* v. *Earl Brownlow* (5). The undertaking in this case is void on the ground that it was given for an illegal consideration, inasmuch as there was a tacit understanding actuating both parties that criminal proceedings should not be taken. It is not necessary to prove an express agreement not to prosecute: *Lound* v. *Grimwade* (6); *Williams* v. *Bayley* (7). The existence of a civil liability may be important in determining the intention of the parties where the debt is paid by the defaulting party himself; but in *Flower* v. *Sadler* a distinction is drawn between a case of that kind and a case like this, where the debt is paid by a third party who is under no obligation to the creditor, and the same distinction is implied in *Ward* v. *Lloyd*. Those cases, therefore, have no application. It is, at least, doubtful whether an action can be maintained for a civil injury resulting from a felony before prosecuting the criminal. In *Appleby* v. *Franklin* (8) it was laid down that the criminal remedy must precede the civil remedy, on the ground that the interest of the public required that the law should be vindicated first.

VAUGHAN WILLIAMS, J. (after stating the facts, proceeded as follows):—

The question is, whether these securities, which were taken by the directors, are valid securities, or whether they are securities

(1) 6 Man. & G. 785; 7 Scott, N. R. 499.
(2) 10 Q. B. D. 572.
(3) 45 Ch. D. 351.
(4) 9 Q. B. 371.
(5) 4 H. L. C. 1, 163.
(6) 39 Ch. D. 605.
(7) Law Rep. 1 H. L. 200.
(8) 17 Q. B. D. 93.

given under such circumstances as to entitle the Plaintiffs to the relief which they claim.

This is not one of those cases in which there was no debt. There was an existing debt for money had and received. There was a debt in the sense that everyone who gets the money of another put into his hands, and has no consideration upon which he can rely to keep it, is liable to be sued for money had and received, and must return it. Under those circumstances, it seems to be established by the case of *Ward* v. *Lloyd* (1) that a creditor is not disentitled, merely because he has come to the conclusion that his servant or agent has robbed him, and may have threatened his servant or agent with prosecution, from putting pressure upon him to recover the civil debt. But even in that case, I take it, that if an agreement had been made that there should be no prosecution, that agreement would have been void and illegal, and if the judgments of the learned Judges in the case of *Ward* v. *Lloyd* are looked at it will be seen that each one of them carefully avoids saying that the contract before the Court in that case could have been supported if it had included a contract not to prosecute. Mr. Justice *Maule*, for instance, puts this very shortly. He says (2): "In substance the transaction was fair and honest; and there is no necessity to impute to the plaintiff the making of a corrupt agreement which he has expressly denied."—That corrupt agreement is the agreement not to prosecute—"Any expectation that the defendant may have entertained, that, if he gave the required security, he might escape prosecution, will not of itself vitiate the transaction." Again, in the case of *Flower* v. *Sadler* (3), which expressly follows and is based upon *Ward* v. *Lloyd*, some, at all events, of the Lord Justices say the same thing. Lord Justice *Cotton* says: "In my opinion a threat to prosecute does not necessarily vitiate a subsequent agreement by a debtor to give security for a debt, which he justly owes to his creditor. I cannot satisfy myself that *Denman*, J., was wrong in the inference which he drew from the facts; he arrived at the conclusion that the bills were not indorsed under the influence of the plaintiff's threat, and that

(1) 6 Man. & G. 785. (2) 6 Man. & G. 791.
(3) 10 Q. B. D. 572, 576.

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the transaction between *Maynard* and the plaintiff was done in the ordinary course of business." It is quite plain, therefore, that Lord Justice *Cotton* would not have supported the indorsement in *Flower* v. *Sadler* (1) if the indorsement had expressly been made in consideration of the promise not to prosecute. Therefore, it seems to me that the authorities come to this that whenever there is an agreement not to prosecute, that is an illegal consideration to form a part of any contract, and the contract will be void. I do not think it makes any difference whether the agreement is expressed or implied. In fact, in the case of *Williams* v. *Bayley* (2), and also in the case of *Brook* v. *Hook* (3), the agreement not to prosecute was only implied; and in *Williams* v. *Bayley* the bargain included the giving up of the documents which were the *indicia* of the crime. The rule of law is, that whenever an agreement is made in consideration of a promise not to prosecute, such an agreement is made for an illegal consideration and cannot be enforced, and will give the persons seeking to set aside such agreement the right to be put in the same position as they were before the agreement was entered into.

That being so, what difference does it make that in any case there is an existing debt which the creditor has a right to recover? The difference it makes is this. It makes a difference in fact. It makes a difference as to the inference that you are to draw. I suppose that of the whole number of cases which have occurred on this doctrine of law, there have been very few where the parties to the agreement have put down in black and white, "I promise to pay you such and such a sum of money in consideration that you will not prosecute me for the offence which I have committed." That does not very often occur. It is nearly always a question of what the real agreement was, and not of what the express agreement was, and in considering the question of inference it is plain that the existence of a debt is a matter of great importance, because the debtor may be willing to pay his debt quite irrespective of any promise that he shall not be prosecuted. As I understand *Ward* v. *Lloyd* (4) and *Williams* v. *Bayley*, all that those cases decide is, that the mere fact that a debtor

(1) 10 Q. B. D. 572.
(2) Law Rep. 1 H. L. 200.
(3) Law Rep. 6 Ex. 89.
(4) 6 Man. & G. 785.

who may be acting under a proper sense of his duty to pay his debt, has also the hope that if he pays the debt he will not be prosecuted, is not of itself sufficient to vitiate the agreement, unless the tribunal before whom the question comes is prepared to find that in the understanding of both parties it was a term of the agreement that there should be no prosecution.

Now, I have to determine in this case whether it was a term of the agreement that there should be no prosecution. It will be borne in mind that in *Ward* v. *Lloyd* (1), *Tindal*, C.J., when he is refusing in that case to draw the inference that it was an unexpressed but real term of the agreement there that there should be no prosecution, says (2): "It must be remembered that this is not the case of a security given to induce an uninterested party to withhold a charge of a criminal nature: there is a just debt due from the defendant to the plaintiff. The plaintiff may have held out threats of prosecution in order to induce the defendant to give the warrant of attorney: but there is the positive denial on the part of the plaintiff that he made any such agreement as that suggested." Also in *Flower* v. *Sadler*, *Cotton*, L.J., says (3): "It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor." Now *Tindal*, C.J., and *Cotton*, L.J., take the two states of things which they consider are material to be considered when you are asking yourself the question, "Aye or no, was there an agreement here"? The thing that *Tindal*, C.J., relies on is the existence of the debt, and the thing that *Cotton*, L.J., relies on is the fact of the promise to pay being by the debtor.

Now, there is in this case that which *Tindal*, C.J., relied on—viz., the existence of the debt. At all events, there is a debt in the sense in which *Tindal*, C.J., used the word, because that was a case of an agent who had embezzled moneys. The question is what is the proper conclusion to draw in the absence of that which *Cotton*, L.J., relied on—viz., the fact of the promise to pay being made by the debtor himself. For in this case undoubtedly

(1) 6 Man. & G. 785. (2) 6 Man. & G. 789.
(3) 10 Q. B. D. 576.

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the offer to make good the default and the giving of the securities for that purpose were by persons who were under no obligation whatever to pay the debt.

I confess that if I were to act upon my view of what would be right in this particular case, apart from the application of the rules of law, as I understand them, which have been laid down, I should be anxious if I could to support these securities. There does seem to me morally, at all events, to be an enormous difference between a case where the person receiving the security comes in contact with the person giving it, and puts pressure upon the person giving it, and a case like the present, where the person receiving and the person giving the security hardly come in contact at all and when, even when they do come into contact, there is no personal pressure exercised of any sort or kind. I say that if I could see my way to support these securities I should be glad under the circumstances to do so. I feel that at all events one ought to try to draw a line somewhere so as not to have it said that every time the friends of a man, who has been guilty of a criminal act, come forward and take upon themselves the debts that he may have incurred in connection with his crime, their offer is to be treated as void and illegal. If one ought not so to lay down the law as to include every one of these cases, where is one to draw the line? Let us look on one side of the line and the other. It would seem to be clear, that so far as the persons giving the security are concerned they must be cognizant of the crime which the person whom they seek to help has committed, otherwise the doctrine does not seem applicable at all. That is present here, because there is no doubt that Mr. and Mrs. *Jones* both knew that their relative had been guilty of these frauds. Then one must, I think, also find that the persons coming forward and taking upon themselves the debt, must have been actuated by the desire to prevent a prosecution. That also is present here. I have no doubt that Mr. and Mrs. *Jones*, in coming forward, were actuated by the desire to prevent a prosecution, and somehow or other it seems to me that the very form of the agreement which, in my view, put an end to the indebtedness of *Cadwaladr* for the £526 altogether, was, to some extent, affected by their desire that the

matter should be so carried through as to most effectually give them that which they wanted—that is to say, the prevention of the prosecution. But that is not enough; something is wanted on the other side. Now, on the other side there must be, in the first place, either an intention to prosecute or threats to prosecute, and I find here that there were threats to prosecute. But then something more is wanted on that side. I think that the person receiving the promise or the security must be aware that the person giving the promise or the security would not have come forward but for the threat or the probability of the prosecution. When I say that all these things are necessary and are present in this case, I think that I still leave it possible that many cases might occur of persons coming forward and undertaking to make good the default of a man who has committed a crime, from which these elements would be absent on the one side or the other.

I now proceed to consider the grounds on which I have come to the conclusion that these elements are present here. At one time I was not sure that the Plaintiffs were induced to give the promise which they gave by reason of the wish that they had to get rid of the prosecution of Mr. *Cadwaladr*. I was not sure whether they might not have given this promise even apart from the hope of avoiding a prosecution. The Plaintiffs took security from *Cadwaladr*. They took security from a criminal, and it occurred to me that possibly one might infer that what induced them to take upon themselves the responsibility for this debt was not the hope, or expectation, or understanding that *Cadwaladr* should not be prosecuted, but their belief that whether *Cadwaladr* was prosecuted or not they were incurring no money liability. But, on the whole, I do not think that I ought to come to that conclusion. No doubt they did attempt to protect themselves from money loss by taking this security, but having regard to the evidence of young *Cadwaladr* and that letter which he wrote at the dictation of his father to Mr. *Elias Jones*, I think that I ought to come to the conclusion that Mr. *Elias Jones* and Mrs. *Jones* took upon themselves this liability in respect of a matter as to which they were under no responsibility at all, because they hoped thereby to prevent

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the prosecution of their relative. Had it not been for that hope they would never have taken upon themselves this responsibility at all. That being so I have only to ask myself the further question: Did the directors of this company know that it was the fear of the prosecution of their relative which induced Mr. and Mrs. *Jones* to come forward, and did they, trading upon that fear, accept the payment and the promise of payment from Mr. and Mrs. *Jones?* On the whole, I have come to the conclusion that they did know it, and I am a good deal influenced in this conclusion by the resolution of the 30th of March, a resolution which seems to me to shew that Mr. *Cadwaladr* must have mentioned to the directors the hope of getting his relatives to come forward and save him from prosecution. Under these circumstances I find, not only that Mr. and Mrs. *Jones* entered into this contract and made themselves liable, and made this payment by reason of their fear of the prosecution of their relative, but that the directors, when they accepted this payment and accepted this agreement, knew they were getting it by reason of Mr. and Mrs. *Jones* fearing the prosecution of *Cadwaladr*. Therefore, they may be said to have traded on, or made a profit by this fear. I must give my judgment for the Plaintiffs.

Solicitors: *Indermaur & Brown*, agents for *J. T. Roberts & Roberts, Carnarvon; Robbins, Billing & Co.*, agents for *George Henry Ellis, Blaenau-Festiniog.*

H. B. H.

MOORE *v.* NORTH WESTERN BANK.

ROMER, J.

1891
April 13, 14.

[1889 M. 2194.]

Company—Transfer of Shares—Non-registration of Transfer—Pre-existing Equitable Title to Shares.

As between two persons claiming title to shares registered in the name of a third person in a company formed under the *Companies Act*, 1862, with articles of association regulating the transfer of its shares, the title prior in date prevails, unless the claimant second in point of time can shew that as between himself and the company he has before the receipt by the company of notice of the prior title, acquired the full status of a shareholder, or, at all events, that all the formalities have been complied with, and that some purely ministerial act alone remains to be done by the company which, as between himself and the company, the company would be bound to do forthwith.

THE Plaintiffs in this action were the beneficiaries under the will of Mr. *J. L. Moore*, of *Southport*, and the Defendants were the holders of certain transfers of shares deposited with them as security. After the death of Mr. *J. L. Moore* in April, 1873, a portion of his residuary estate was invested in the sole name of *J. S. Bradbury*, one of the two executors and trustees of the will; and among the investments were twenty shares in the *West India and Pacific Steamship Company*. On the 19th of July, 1889, the Plaintiffs discovered that *J. S. Bradbury* had absconded, and, further, that the investments had been standing in his sole name. On the 20th of July, 1889, the Plaintiffs served a notice upon the *West India and Pacific Steamship Company* (*Limited*) not to register any transfer of the twenty shares, and that they were trust property. *J. S. Bradbury* had deposited the certificates of the twenty shares with the Defendant bank as security for moneys due from the *Liverpool* firm of which he was a member, and also a transfer, which was in blank as to the names of the transferees, and the register number of the shares. Authority was at the same time given by him to the bank to fill in the name and numbers. The bank filled in the blanks by inserting as transferees the names of two other Defendants, *A. S. Brown* and *J. W. Fowler*, and the register numbers of the shares, and on

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the 19th of July, 1889, the same were left for registration with the steamship company.

The following were the material articles of association of the steamship company:—

18. "No person shall exercise any rights or privileges of a shareholder until he shall have been registered in the register of shareholders and shall have paid all calls and other moneys due for the time being on every share in the capital stock held by him."

Art. 19 provided that the company should not be bound to regard trusts.

21. "The person appearing in the register of shareholders to be the holder of any share shall be entitled (subject to the regulations and in manner hereinafter expressed) to sell and transfer such share to any person who may be approved by the directors, such person not being an infant, lunatic, married woman, or under any legal liability."

22. "Every transfer of a share not effected by operation of law shall be made in such form as the directors shall from time to time approve, and shall be deposited at the chief office of the company."

23. "Any transfer or attempted transfer not approved of by the directors shall be absolutely void, both at law and in equity, and the then registered holder of the share expressed to be transferred shall continue to be a shareholder in respect thereof, and notice of such non-approval shall within fourteen days of such instrument of transfer being left as aforesaid, be sent to the shareholder purporting thereby to transfer such share."

The alleged transfer of the twenty shares to *A. S. Brown* and *John W. Fowler* had not been registered or approved by the directors of the steamship company. On the 2nd of August, 1889, an order was made restraining the steamship company from registering the twenty shares, ordering the *North-Western Bank* to sell the shares—the proceeds of sale to be subject to the same rights and equities as the shares sold—and the steamship company were dismissed from the action. The Plaintiffs now claimed a declaration that the *North-Western Bank* and *A. S. Brown* and

John W. Fowler were not entitled to the twenty shares, and that the Defendants might be ordered to re-transfer the said shares, or to account for the proceeds thereof with interest if the same had been sold.

The practice of the directors with reference to transfer of shares is stated in the judgment.

Healey, Q.C., and *F. Thompson*, for the Plaintiffs :—

The question (1) is whether anything which has transpired has displaced the prior equity of the Plaintiffs and given the bank a legal title to the shares. The company is one formed, not under the *Companies Clauses Act* under which registration is not necessary to complete the title of the transferee: *Nanney* v. *Morgan* (2), but the *Companies Act*, 1862, and is regulated by its articles of association, which give the directors a power of approving of the proposed transferee, and make registration a condition precedent to his enjoyment of the rights of a shareholder; and the legal title which is only inchoate until registration will not oust a pre-existing equitable title, nor will the Court compel the completion of that which would be a fraud: *Roots* v. *Williamson* (3); *Société Générale de Paris* v. *Walker* (4).

The Defendants cannot succeed unless they can shew that something short of a legal title will defeat a pre-existing equity; that at the date of the order on the motion they could have required the company to register the transfer; but no transferee has a right to compel registration before the expiration of the reasonable time which is allowed directors for approving of the proposed transferee, which no one can contend had expired when the company received notice of the Plaintiffs' claim.

Neville, Q.C., and *O. L. Clare*, for the Bank :—

Primâ facie, on execution of the transfer, the legal title to the shares passes to the transferee, who becomes "complete master of the shares": *Dodds* v. *Hills* (5); unless registration be required

(1) A further point was raised whether, on the articles of association, a deed was required for the transfer of shares; but having regard to the judgment this became immaterial.

(2) 37 Ch. D. 346.
(3) 38 Ch. D. 485.
(4) 11 App. Cas. 20, 28, 29.
(5) 2 H. & M. 424.

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by the articles as part of the transfer. Here it is not so required, the provisions of art. 18 making registration necessary for the enjoyment of his rights as a shareholder would be useless if the transferee had not already become a shareholder. The transfers were in order, to which no objection could be taken, and on lodging the transfer the transferee has done that which in the ordinary course of business is generally followed as a matter of course by registration, and has fulfilled the condition on performance of which he can claim the legal interest in the shares: *Dodds* v. *Hills* (1), *Blackwood* v. *London Chartered Bank of Australia* (2), and *Ex parte Sargent* (3).

[*Healey* referred to the comments on *Ex parte Sargent* in *France* v. *Clark* (4).]

This case is distinguishable from *Roots* v. *Williamson* (5), for there some necessary act on the part of the transferee still remained to be done when the company received notice of a breach of trust, and the article on which the judgment was founded laid down two conditions precedent, viz., execution of the transfer and registration.

Again, in *Société Générale de Paris* v. *Walker* (6), the transfer was not in order, and the directors had a right to decline to accept it, and before the mistake was rectified the company had notice. The time to be looked at, in the absence of express provision, as the moment at which the rights are fixed is the time of the deposit of the transfer: *In re Cawley & Co.* (7). The real test is whether the Court could have restrained the company from registering the transfer when presented.

ROMER, J.:—

In my judgment the Plaintiffs are entitled to succeed. The law applicable to the case may be expressed as follows:—

As between two persons claiming title to shares in a company like this, which are registered in the name of a third party,

(1) 2 H. & M. 424.
(2) Law Rep. 5 P. C. 92, 110, 111.
(3) Ibid. 17 Eq. 273.
(4) 26 Ch. D. 257, 265.
(5) 38 Ch. D. 485.
(6) 11 App. Cas. 20, 28, 29.
(7) 42 Ch. D. 209.

priority of title prevails, unless the claimant second in point of time can shew that as between himself and the company, before the company received notice of the claim of the first claimant, he, the second claimant, has acquired the full *status* of a shareholder; or at any rate that all formalities have been complied with, and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and the company he may be said to have acquired, in the words of Lord *Selborne* (1), "a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title." For that proposition the cases of *Société Générale de Paris* v. *Walker* (2) and *Roots* v. *Williamson* (3) are sufficient authorities, and I need not refer to the cases cited by the Defendants in argument, which were decided previously to *Société Générale de Paris* v. *Walker*.

Now of the articles of association of the *West India and Pacific Steamship Company*, the important ones are the 18th, 21st, and 22nd. Having regard to these articles, it appears to me to be clear that a transferee of shares in the company, even under a transfer right on every point of form, cannot say as against the company that he becomes a shareholder immediately on the execution of the transfer, or that the company immediately on the sending in the transfer had only to perform a ministerial act. Under these articles the directors clearly have a right to consider who the proposed transferee is, and have time given to them within which to approve of that person as transferee, and if they do not choose to approve within fourteen days of the proposed transferee as a proper person to be registered as a shareholder may decline so to register him, and the transferee will not be a shareholder, nor has he the right to compel the company to make him a shareholder.

It appears from the evidence of the secretary to the Steamship Company that the practice of the company, which is in accordance with the articles, is as follows: when transfers are sent in

(1) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, 29.

(2) 11 App. Cas. 20, 28, 29.

(3) 38 Ch. D. 485.

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for registration the particulars of the proposed transfer are entered in a book, which is brought before the board at the next meeting for the directors to consider. Then if the board approve of the transfer three of the directors present at the board meeting at which the transfer is considered, sign the particulars in the book; and then, and not before, is the transfer registered, and the transferee becomes invested with the full rights of a shareholder. It also appears from the secretary's evidence that in accordance with the articles, the board have before now exercised the right, which in my judgment they undoubtedly have under the articles, of refusing to register a transfer presented to them for consideration, and to admit a proposed transferee as a shareholder.

That being so, the transfer in the present case was sent in to the company on the 18th or 19th of July, 1889. Then before there was any approval by the board of the transfer, or, indeed, any consideration by the board of the transfer at all, the company on the 20th of July received notice of the Plaintiffs' claim. Having received that notice they properly, in my judgment, refused further to proceed with the transfer until the Plaintiffs in this case obtained the direction of the Court in the action which they at once instituted. The Court had seisin of the matter before anything was done, so far as the company was concerned; and indeed the transfer in this case was only registered by virtue of an arrangement between the parties under which the shares were to be sold without prejudicing the rights of the parties which were to remain as if the transfer of the shares had not been registered or the shares sold.

Under these circumstances, it appears to me to be clear that the *North Western Bank* were not so invested with the full rights of shareholders before the Steamship Company had notice of the Plaintiffs' claim, and have not (again to use the words of Lord *Selborne*), acquired as against the company "a present, absolute, unconditional right to have the transfer registered." The company acted rightly in the matter in not proceeding with the consideration of the transfers sent in to them after the action was commenced and the motion made to obtain the direction of the Court as to the rights of the parties.

In the result, I declare that the Plaintiffs, the beneficiaries under the will of the late Mr. *J. L. Moore*, are entitled to the proceeds of these shares.

Solicitors for Plaintiffs: *Robins, Cameron, Kemm, & Pothecary.*

Solicitors for Defendants: *Pritchard, Englefield, & Co.*, agents for *Simpson & North, Liverpool.*

A. C. E.

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[1887. W. 395.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257, 268 [*Revised Ed., Statutes, vol. xvii., pp.* 567, 602, 605]—*Expenses of Sewering Street—Recovery of by Urban Authority—Charge—Legal and other Expenses whether included—Jurisdiction—Appeal to Local Government Board.*

A local board, under the powers of the *Public Health Act*, 1875, executed paving and other works in a street, and sought to charge the Defendants with an apportioned amount of the expenses. In the amount apportioned was comprised an estimated sum in respect of legal and other expenses, including expenses of collection.

In an action by the local board to enforce their charge, the Defendants not only disputed their liability to payment, but contended that the estimated sum was not properly included in the apportionment. *Chitty*, J., decided in favour of the Plaintiffs on both points.

The Court of Appeal affirmed the judgment of *Chitty*, J., as to the liability of the Defendants, and:—

Held, that it was not competent to the Defendants to raise the objection in respect of the estimated sum in the present proceedings, and that the only remedy open to them on this point was by way of appeal to the Local Government Board under sect. 268 of the Act of 1875.

APPEAL from Mr. Justice *Chitty*.

This was an action by the *Local Board of Walthamstow*, as the urban sanitary authority for the district, to enforce charges upon the property of the Defendants under sect. 257 of the *Public Health Act*, 1875, in respect of expenses incurred under sect. 150 of the Act in sewering, levelling, paving, and making good two roads in the Plaintiffs' district known as the *Boston Road* and the *Chelmsford Road*, in which the Defendants' property was situated.

The facts material for the purposes of this report are as follows:—The roads in question were laid out in 1867 and 1868 by a land company for the purposes of sale; and, according to the evidence, they were neither properly formed nor properly sewered. After laying out the roads the land company sold the adjoining land in building plots. On these plots various houses, the drains of which were connected with the land company's sewers, were built at different times between 1871 and 1878;

and in 1881 some of these houses had become the property of the Defendant *Hulbert*. At that time both the roads and the sewers were in bad repair, and on the 25th of May, 1881, the Plaintiffs, the local board, who had been formed under a provisional order in 1873, served notices upon the frontagers, including *Hulbert*, requiring them to sewer, level, pave, and make good the roads. The frontagers did not comply with the requirement, and the Plaintiffs employed a contractor to do the works, which were completed in March, 1883.

In October, 1883, *Hulbert* mortgaged his houses to the Defendant *Bellamy* and other persons also Defendants to this action. In February, 1884, the Plaintiffs served *Hulbert* with notices of the sums apportioned upon his houses in respect of the expenses of executing the works. The total sum apportioned included certain items consisting of an estimated sum of 4 per cent. for extras, a sum for legal and other expenses, and a further sum of 4 per cent. for expenses of collection.

In June, 1884, the Plaintiffs served *Hulbert* with notice of demand for payment of the sums apportioned on his houses. *Hulbert* did not comply with the demand, and the Plaintiffs in December, 1884, summoned him before a magistrate, who, after several adjournments, on the 27th of May, 1885, made a personal order against him for payment of the sums demanded. *Hulbert* did not comply with the order, and the Plaintiffs, without taking any steps to enforce the order against him personally, brought this action against him and his mortgagees on the 31st of January, 1887, and claimed a declaration that they were entitled to charges on the premises in *Chelmsford Road* and *Boston Road* aforesaid for the amounts apportioned thereon respectively, an order that such charges might be enforced by a sale of such premises, and a receiver of the rents and profits of the premises.

The action was tried before Mr. Justice *Chitty* in July, 1890, and the learned Judge, on the 10th of July, 1890, found upon the evidence that the roads in question were not highways repairable by the inhabitants at large (as had been contended by the Defendants); and, after further argument, he held, on the 16th of July, (1.) that the powers conferred by the 150th section of the Act of 1875 were exerciseable once only; (2.) that if the Board

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were once satisfied they were not at liberty afterwards to say that they were dissatisfied (*Bonella* v. *Twickenham Local Board of Health* (1)); (3.) that the Board were entitled to a reasonable time within which to make up their minds whether they were dissatisfied with the existing sewer, and whether they would put their powers into operation; (4.) that the board in this case never were satisfied that the roads in question were properly sewered, &c., and that they had reasonable grounds for being dissatisfied; and (5.) that having regard to the character of the district, the nature of the ground, and of the time and work that were necessary for properly sewering and draining the roads, there had been no unreasonable delay on the part of the Plaintiffs in putting their powers in operation. His Lordship then continued: "From what I have decided it follows that the sewer was part of the works which the local authorities were entitled, in default of being executed by the frontagers, to do themselves, and the sum to be apportioned rightly included the expense of making the sewer. It was urged that there were other sums included in the total sum to be apportioned which ought not to have been found there, and it is right that I should give a decision with reference to this point. It is said that in the sum to be apportioned there were included what may be termed the 'law costs' of the contract. The board were entitled under an Act of Parliament to employ and were justified in employing a contractor; it was part of the expense of executing these works that there should be a proper contract. The law expenses to a moderate amount were rightly included in that sum. There were also some allowances made for extras and contingencies, which I do not propose to go through in detail, but I express my opinion generally with regard to all, that they were rightly included." The learned Judge then made an order charging the premises in *Boston Road* and *Chelmsford Road* respectively with the sums claimed with interest and costs, giving the usual six months from the date of the certificate for redemption, and an order for sale in default of redemption, and appointed a receiver.

The Defendants other than *Hulbert* appealed, and the appeal was heard on the 16th and 17th of April, 1891.

(1) 20 Q. B. D. 63.

Pollard, and *Hugh Mitchell*, for the Appellants:—

These sewers were, perhaps, badly constructed sewers, but they nevertheless vested, in 1873, under s. 43 of the *Public Health Act*, 1848 (corresponding with sect. 13 of the Act of 1875) in the Respondents, who, by sects. 45 and 46 of the Act of 1848, and sects. 15 and 19 of the Act of 1875, were bound to repair and cleanse them, and they were in fact used as sewers from 1868 to 1883 when the new works were completed. The Respondents having lain by for so long, and without expressing dissatisfaction, were not entitled in 1881 to call upon the frontagers to resewer the roads under sect. 150: *Bonella* v. *Twickenham Local Board of Health* (1). Next, the Respondents are seeking to charge our property with a proportion of the 8 per cent. added to the actual cost of the works for legal and other expenses and for expenses of collection. These are not expenses incurred in the execution of the works within sect. 150, and therefore are not proper subjects of a charge under sect. 257.

Byrne, Q.C., and *Shebbeare*, for the Respondents:—

As to the sewers, the evidence justified the finding of Mr. Justice *Chitty* that these roads never were sewered to the satisfaction of the Plaintiffs. As to the 8 per cent. alleged to have been improperly added to the costs of the works, the Appellants cannot dispute that here; their proper remedy was an appeal under sect. 268 to the Local Government Board: *Wake* v. *Mayor of Sheffield* (2); *Shanklin Local Board* v. *Miller* (3).

Hugh Mitchell, in reply:—

Sect. 268 has no application to the case of the Appellants against whose property a charge is sought to be enforced; it only applies to a case in which summary proceedings are pending or possible; here the time for summary proceedings had expired, long before the Appellants had notice of any decision of the local authority. Further, the only decision of the local authority with which the Appellants are aggrieved is the decision to commence this action, which is not a decision within sect. 268.

(1) 20 Q. B. D. 63. (2) 12 Q. B. D. 142.
(3) 5 C. P. D. 272.

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[KAY, L.J.:—Why did you not appeal to the Local Government Board within twenty-one days after you had notice of the demand for payment which was made upon *Hulbert*?]

We were not aggrieved by a personal demand upon *Hulbert;* on the contrary, if *Hulbert* had complied with the demand, we should have benefited, as our property would then not only have escaped the charges of which we now complain, but also the charges for paving, &c., which are unobjectionable.

Next assuming that the appeal to the Local Government Board given by sect. 268 is competent to the Defendants in an action brought in the High Court to enforce a charge as well as to owners liable to summary proceedings for the recovery of private improvement expenses, the jurisdiction of the High Court to inquire into the propriety of the expenditure sought to be made a charge upon the Defendants' property is not thereby ousted.

[KAY, L.J.:—Is not the decision of *Wake* v. *Mayor of Sheffield* (1), against you?]

No doubt the opinion of Lord *Esher*, M.R., in that case is so; but it is only *obiter dictum.* The only express decision against us is *Cook* v. *Ipswich Local Board of Health* (2), which ought to be overruled. That case was followed doubtingly in *Shanklin Local Board* v. *Miller* (3), and is inconsistent with the observations of Mr. Justice *Mathew,* in *Eccles* v. *Wirral Rural Sanitary Authority* (4). If we are wrong on this point then *Bonella* v. *Twickenham Local Board of Health* (5) was wrongly decided.

[BOWEN, L.J.:—In that case the objection of the frontagers to being charged with the cost of the new sewer raised the question of the jurisdiction of the local authority to resewer the street in question at their expense.]

In that case, as in this, part of the expenses sought to be recovered from the frontagers were incurred in levelling paving, and metalling the street. These expenses were properly recoverable from the frontagers had they been separately apportioned.

(1) 12 Q. B. D. 142.
(2) Law Rep. 6 Q. B. 451.
(3) 5 C. P. D. 272.
(4) 17 Q. B. D. 107, 112.
(5) 20 Q. B. D. 63.

The objection of the frontagers in that case was precisely our objection in this, viz.: that part of the expenses sought to be recovered against us, whether in respect of "sewering," or in respect of the 8 per cent. added for legal and other expenses, are not expenses which the local authority are entitled to recover from the frontagers under sect. 150. There is no distinction in principle between "sewering expenses" and "legal or other expenses," they must both stand or fall by the same test, viz.: are they properly recoverable from frontagers under sect. 150 or not.

[*Reg.* v. *The Local Government Board* (1), was also referred to during the arguments.]

LINDLEY, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, which raises some questions of nicety on the *Public Health Act* of 1875. Mr. Justice *Chitty* has declared that certain sums expended by the *Walthamstow Local Board* under the powers of the *Public Health Act*, 1875, in sewering and making good two roads called the *Boston Road* and the *Chelmsford Road*, are charges on the lands belonging to the frontagers.

The appeal raises three points. First of all it is said that these roads were not proved not to be in the language of sect. 150 highways "repairable by the inhabitants at large." The second point was that it had not been shewn that a sewer which had been made and used and had become vested in the urban authority was not "to the satisfaction of the urban authority." The third ground of objection is, that the apportionment of the expenses of sewering and making good the roads included certain items which were not chargeable properly against the frontagers. Those three heads require to be dealt with separately, and if the Appellants are right either on the first or second point, they would have shewn that there was no jurisdiction to make this charge at all.

Looking at the facts, Mr. Justice *Chitty* has decided that it has been proved to his satisfaction that the roads are not highways repairable by the inhabitants at large. The Appellants

(1) 10 Q. B. D. 309.

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contend that the burden of proving this lies upon the Plaintiffs, and that they have adduced no evidence sufficient to justify the conclusion of the learned Judge. Now, without saying whether the burden of proof is upon the Plaintiffs or not, it appears to us that sufficient evidence has been given by the Plaintiffs, at all events to throw upon the Defendants the burden of showing that it was a highway repairable by the inhabitants at large. And, as they have adduced no evidence of that kind, we think that upon the evidence as it stands, the conclusion of Mr. Justice *Chitty* is obviously right, and that we cannot possibly overrule it.

The next point arises upon the language of sect. 150 of the *Public Health Act*, 1875: "Where any street . . . . not being a highway repairable by the inhabitants at large . . . . is not sewered . . . . and made good . . . . to the satisfaction of the urban authority, such authority may by notice . . . . require" the frontagers to sewer or make good the same; and, if the notice is not complied with, may do the works themselves and recover the expenses in manner therein mentioned. So that, in order to entitle the urban authority to exercise this power it must appear that the street has not been sewered and made good to the satisfaction of the urban authority. This, therefore, is also a question of fact, and Mr. Justice *Chitty* has found as a fact that these roads were not sewered to the satisfaction of the local authority, and upon the evidence we entirely agree with that finding.

These two objections of the Appellants may properly be raised in this action because they go to the jurisdiction of the local authority to execute the works at the expense of the frontagers, but the third objection is governed by different considerations, and relates not to the jurisdiction itself, but to a defect in the exercise of it. The Respondents claim to include in their charges against the frontagers an estimated sum amounting to 8 per cent. of the actual cost of the works executed added for legal and other expenses including expenses of collection. I think it is not clear that the Respondents are entitled to add to the actual expenses of the works the particular items complained of. But it is not necessary to decide this question in the present case, because I think that the Appellants cannot raise this objection in these proceedings, and that the only remedy open to them on this

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point was an appeal to the Local Government Board under the 268th section of the Act of 1875. That section has been brought to the attention of the Court three or four times, and without going through or commenting on the cases I may say shortly that the point is covered by *Bayley* v. *Wilkinson* (1), *Cook* v. *Ipswich Local Board of Health* (2), and *Wake* v. *Mayor of Sheffield* (3). I do not think that these cases are conclusive upon the question of jurisdiction, and I have dealt with that question as a question of fact, but within the jurisdiction I think those cases are conclusive.

The appeal must be dismissed with costs.

BOWEN and KAY, L.JJ., concurred.

Solicitors: *Wood, Bigg & Nash*, agents for *Marshall, Devizes; Houghton & Son.*

W. W. K.

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Jan. 17, 24.
C. A.
April 25, 27.

In re J. THORLEY.
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[1877 T. 105.]

In re W. R. THORLEY.
THORLEY *v.* MASSAM.

[1884 T. 1136.]

Revenue—Legacy Duty—Will—Trust to carry on Testator's Business in conjunction with his Son—Bequest of Annual Sum to Trustees while carrying on the Business—Bequest of Annual Sum to Son while managing the Business in conjunction with the Trustees—Stamp Duties Act, 1845 (8 & 9 *Vict. c.* 76), *s.* 4 [*Revised Ed. Statutes, vol. ix., p.* 889].

A manufacturer, by his will, gave his factory and business to trustees upon trust to carry on the business in conjunction with his son, and declared that, while the trustees should be carrying on the business, each of them should receive the annual sum of £250 out of the profits thereof, and that, while his son should be managing the business in conjunction

(1) 16 C. B. (N.S.) 189; 33 L. J. (M.C.) 161. (2) Law Rep. 6 Q. B. 451.
(3) 12 Q. B. D. 142.

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with the trustees, he should be entitled to the said annual sum of £250 more:—

Held, by the Court of Appeal (affirming the judgment of *North*, J.), that the sums received by the trustees and by the son, in pursuance of these directions, were legacies, and liable to legacy duty under sect. 4 of the *Stamp Duties Act*, 1845.

APPEAL from the judgment of Mr. Justice *North*, upon a question raised by a petition presented in two administration actions, of which one related to the estate of *Joseph Thorley*, and the other to the estate of his son *W. R. Thorley*, both deceased.

Joseph Thorley, by his will, dated the 19th of November, 1873, appointed *Josiah Watson Thorley, William Roy*, and *Thomas Capon* to be the trustees and executors thereof. And he gave and bequeathed his leasehold factory, and the stock-in-trade, plant, and good will of the business which he carried on there, and the debts owing to him in his business at the time of his death, to his said trustees, upon trust that they, or other the trustees or trustee for the time being of his will, should continue and carry on the business in conjunction with his son *W. R. Thorley* (if he should be living) for the several periods and in manner therein mentioned. And the testator declared that the said trustees or trustee, in conjunction with *W. R. Thorley* (if alive), might appoint a manager to manage the business, at such salary as the said trustees or trustee in such conjunction as aforesaid should think fit. The testator then continued, "And I declare that whilst the said trustees or trustee shall be carrying on the said business, each of them the said trustees, or he the said trustee, shall receive the annual sum of £250 out of the profits thereof. And I further declare that, if in any year the profits of the said business shall be 25 per cent. over the profits for the year ending the 30th of June next before my decease, ... then in every such year each such trustee, or he the sole trustee for the time being, shall receive the sum of £500 in lieu of the said sum of £250. . . . . And I declare that, whilst my said son *W. R. Thorley* shall be managing my said business in conjunction with the said trustees or trustee, he the said *W. R. Thorley* shall be entitled to the said annual sum of £250 more, as also to £500 in the event of such increase of profit as is hereinbefore mentioned in that

behalf." The testator then directed that the trustees or trustee for the time being of his will should accumulate one-third part of the net profits of the business until the death of the then present wife of *W. R. Thorley*, or for the period of twenty-one years after his decease (whichever should be the shorter period), and that, upon the termination of the said period of accumulation, or upon his death, if the then present wife of *W. R. Thorley* should predecease him, the fund derived from such accumulation (if any) should be paid to *W. R. Thorley*, if then alive. The testator also gave similar directions for the accumulation of the other two-thirds of the net profits of his business for the benefit of other persons.

By a codicil dated the 30th of September, 1875, the testator revoked his will so far as the said *Josiah Watson Thorley*, *William Roy*, and *Thomas Capon* were objects thereof, and substituted *Thomas Massam*, *Harry Clark*, and *Seth Phillips* in their place, and he directed that his said will should take effect in the same manner as if their names had been originally inserted throughout the said will instead of the names of the said *Josiah Watson Thorley*, *William Roy*, and *Thomas Capon*. And the testator bequeathed to each of them the said *Thomas Massam*, *Harry Clark*, and *Seth Phillips* the sum of £250, free of legacy duty, provided they acted in the trusts of his said will respectively.

The testator died on the 22nd of November, 1876. His will and codicil were proved on the 12th of December, 1876, by the executors named in the codicil.

On the 13th of April, 1877, an order was made in the first action for the administration of the testator's estate by the Court. The wife of *W. R. Thorley*, mentioned in the will, died on the 12th of October, 1881. *W. R. Thorley* died on the 16th of September, 1882. By his will, dated the 11th of September, 1882, he appointed *Thomas Massam* and *F. M. Russell* his executors. On the 28th of June, 1884, an order was made in the second action for the administration of the estate of *W. R. Thorley* by the Court.

Thomas Massam, *Harry Clark*, and *Seth Phillips* had carried on and managed the business from the death of *Joseph Thorley* until the presentation of this petition on the 9th of November, 1890,

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and had received remuneration in accordance with the terms of the will. *W. R. Thorley,* during his lifetime, managed the business in conjunction with them, and received remuneration at the rate of £250 a year.

The business consisted of the manufacture of food for cattle by a secret process.

The Commissioners of Inland Revenue had recently made a claim for the payment of legacy duty in respect of the annual sums paid by way of remuneration to the trustees of the will of *J. Thorley,* and to his son *W. R. Thorley,* under the provisions of the will. No such duty had been paid.

In order to determine whether legacy duty was payable, this petition was, by the leave of the Court, presented in both actions by the trustees and executors of the will of *J. Thorley* and the executors of the will of *W. R. Thorley.*

The petition was served on the Commissioners, and they agreed to waive any question as to jurisdiction.

The petition asked for the determination by the Court of the following question:—

Whether legacy duty was or was not payable in respect of all or any of the annual sums received by the trustees and by *W. R. Thorley,* under the directions contained in the will of *Joseph Thorley.*

The petition came on for hearing before Mr. Justice *North* on the 17th of January, 1891.

Napier Higgins, Q.C., and *Macnaghten,* for the Petitioners:—

The Crown is not entitled to legacy duty in respect either of the annual allowances to the trustees or of the annual allowance to the son. The claim is founded on sect. 4 of the Act 8 & 9 Vict. c. 76. (1) As to the trustees, the annuities are not "gifts"

(1) Sect. 4 provides that, "Every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, ... whether such gift shall be by way of annuity or in any other form, ... shall be deemed a legacy within the true intent and meaning of all the several Acts granting or relating to duties on legacies in *Great Britain* and *Ireland* respectively, and shall be subject and liable to the said duties accordingly."

to them; they are compensation for services rendered, or in the nature of salaries. "Gift" means pure bounty. *Duncan* v. *Watts* (1) does not apply. There an annuity was given to an executor for his trouble in the conduct and management of the affairs of the testator's estate, and, the estate being deficient, it was held that the annuity must abate with the other legacies. An executor or a trustee, as such, has no right to any payment for his trouble; but, if a testator authorizes his trustee to charge for his time expended in relation to the trusts of his will, the trustee will be allowed his proper charges: *In re Ames* (2). In *In re Pooley* (3) a testator had empowered a solicitor, who was a trustee of his will, to charge the estate for professional business done by him in relation to it, and it was held that, as the solicitor was an attesting witness to the will, he could not claim any profit costs for business done by him in relation to the estate, on the ground that the right to make professional charges was a "beneficial interest" under the will, within the meaning of sect. 15 of the *Wills Act.* But that case depended on the construction of sect. 15, the words of which are not the same as those of sect. 4 of 8 & 9 Vict. c. 76. And in that very case Lord Justice *Cotton* declined to express an opinion whether the solicitor-trustee would have been liable to legacy duty. In order to invalidate a gift to an attesting witness of a will it is not necessary that the benefit should be pure bounty; any benefit is enough for that purpose. In the present case the question is a different one, viz., whether there is a pure gift or bounty of the testator. Suppose a gift by will of £10,000, subject to the burden imposed on the legatee of making a payment of £9000; the Crown could not claim legacy duty on the whole £10,000; only £1000 would be a gift.

[NORTH, J.:—Suppose a testator gave £6000 to his executor, subject to his satisfying a disputed claim of £5000 against the testator, and the executor were to satisfy the claimant by paying him £4000; would not the balance of £2000 be a legacy to the executor and liable to duty?]

That must be admitted. But suppose a testator had in his

(1) 16 Beav. 204. (2) 25 Ch. D. 72.
(3) 40 Ch. D. 1.

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lifetime paid £1000 a year to the manager of his business, on account of his great skill, and then he appointed the manager his executor, and directed by his will that the £1000 a year should be paid to him so long as he continued to manage the business; would that £1000 a year be a "gift?" For the purpose of estimating the duty payable, you must deduct the value of the burden imposed on the legatee, whatever it may be. If you cannot distinguish precisely between the benefit and the burden, legacy duty is not payable. In *Hanson* on the Probate, Legacy, and Succession Duty Acts (1), it is said: "If the effect of the will is merely to authorize him" (the executor) "to make professional charges for services rendered to the estate by himself in the character of, for instance, a solicitor, or an accountant, or a land agent, or to receive a salary or commission for doing what he might otherwise employ an agent to do, as, for instance, getting in the testator's outstanding debts, or collecting the rents of houses let to weekly tenants—this does not amount to a legacy."

Willis v. *Kibble* (2) is referred to in support of this statement, and other cases which shew that the Court has drawn a distinction between bounty and compensation for services rendered. Legacy duty is chargeable only when nothing is given in exchange by the person for whom provision is made by the will; it is not chargeable when the supposed legatee pays for what he receives in meal or in malt.

There is a distinction between the case of an executor and that of a trustee.

Moreover, here the payment is to be made, not out of the testator's estate, but out of the profits of the business after his death. Those profits were created by the exertions of the trustees, and they have, in respect of their services, a preferential claim upon those profits, just as if they had supplied goods for the purpose of carrying on the business.

The annual payment to the testator's son stands in a still better position than those to the trustees. He, not being a trustee, was not in any way bound to render his services, unless he chose to do so. He might insist on being paid for them. He

(1) 3rd Ed. p. 63. (2) 1 Beav. 559.

had been assisting in the management of the business before the testator's death.

Vaughan Hawkins, for the Crown:—

The allowances, both to the trustees and the son, are legacies upon a condition, which may be, perhaps, onerous, and they are subject to legacy duty: *Attorney-General* v. *Sharpe* (1). There the interest on a sum of £5000 was given by a testator to a lady, provided that she should act as parent and guardian to his children, and provide a home for such of them as should require it; and it was held that the bequest was liable to legacy duty. In *Attorney-General* v. *Lord Henniker* (2), a testator by his will gave power to *A. B.* to appoint to his wife by will an annuity chargeable on the testator's land, and *A. B.* accordingly made an appointment by will to his wife, but provided that the annuity was to be in lieu and satisfaction of her dower. It was held that legacy duty was payable in respect of the whole of the annuity. *Sweeting* v. *Sweeting* (3) is to the same effect. A legatee can take or reject an onerous legacy as he pleases; but, if he accepts it, he must pay legacy duty on the whole of it. The present will does not say that the annual payments are given as salaries or as remuneration for services rendered. If the testator had merely directed that persons in his employment at salaries were to be continued in their employment after his death at the same salaries, the case might have been much more difficult for the Crown. The testator has chosen to use words of gift, and it is impossible to say how much of the allowances is not pure bounty. Legacy duty is payable in respect of the whole amount of the annuity received in each case. The Court cannot make a calculation of the value of the legatee's services.

Napier Higgins, in reply:—

The bequest in favour of the son is not a legacy in any sense. It is a direction to the trustees to make a payment for the purposes of the testator's own estate, though it may result in a benefit to the son.

(1) 7 Times L. R. 165. (2) 7 Ex. 331.
(3) 1 Drew. 331.

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NORTH, J. (after stating the provisions of the will and the other facts, continued):—

The question is, whether the dispositions (to use a neutral term) in favour of the trustees of £250 or £500 (as the case may be) out of the profits of the business are or are not chargeable with legacy duty? In my opinion they are, and I think the point is settled by authority. It is thoroughly well settled that, when there is a disposition by will in favour of executors, expressed to be in return for their trouble, that expression does not prevent the disposition from being a legacy upon which duty is chargeable. The rule is the same, whether the thing given is a legacy strictly speaking—that is, one sum, or a succession of legacies in the shape of an annuity during any specified period, or during the continuance of the trusts. An executor's office is proverbially a thankless one, and it necessarily involves some trouble, and therefore a legacy to an executor for his trouble must be given to him in return for something which, in order to entitle himself to the legacy by acting as executor, he must give in exchange for the legacy. The fact that he has to render services in return does not prevent the sum given from being a legacy of the full amount specified (whatever it is), and liable to duty upon that full amount. That is thoroughly settled by practice and authority. The contrary was contended in *Duncan* v. *Watts* (1), where the testator's estate was deficient, and it was argued that a legacy to his executors for their trouble ought not to abate, because it was given for value. That notion was not entertained by the Court, and it is now well settled that a legacy to an executor, or an annuity to an executor, for his trouble, stands precisely in the same position as regards abatement and as regards payment of duty, as any other legacy, in the absence, of course, of any special direction in the will to the contrary. An executor is not entitled to be paid for his services; he is bound to perform the duties which he undertakes without payment, and, if the will gives him a payment for what he does, that is a beneficial disposition in his favour, and is, in my opinion, in the words of the *Legacy Duty Act*, a "gift" to him. It has been urged that trustees stand in a different position from executors.

(1) 16 Beav. 204.

I do not see how, and no case has been cited which draws any distinction between the two in this respect. As regards a trustee as well as an executor, the law requires him, in the absence of express provision to the contrary, to perform the duties which he undertakes, without any remuneration for the trouble which he incurs in performing those duties. In my opinion, a gift to a trustee for his trouble in performing the trusts stands on precisely the same footing as a gift to an executor for his trouble in performing the duties of executor.

This, then, is a gift to the trustees. It is a disposition in their favour, to which they could not be entitled but for the will. If they accepted the trusts, by proving the will and acting as trustees, they would be bound to perform the duties of trustees without payment, but for this clause: and the payment which it entitles them to receive is, in my opinion, a gift to them within the meaning of the word "gift" in sect. 4 of the Act 8 & 9 Vict. c. 76. Then it is said that this disposition is not within that section, because it is a gift out of the profits of the business to be made after the testator's death, and it is said that profits made after his death are not part of his estate. All I can say is that if they are not, the gift of the annuities must fail altogether, because the testator had no power to dispose of that which was not part of his estate. It is only because these profits form part of his estate that the testator is able to make a disposition out of them in favour of his trustees.

I come now to the other disposition in favour of the testator's son, which I read as meaning that a like annual sum of £250 is to be paid to him out of profits, to be increased to £500 out of profits, in the same way as the annuities to the trustees. This legacy or disposition is the only one which has created any difficulty in my mind, because *William Read Thorley* is not a trustee or executor of the will, and he was not in any way bound to perform the duties imposed upon him without being paid for so doing. It is true that he takes beneficially under the will otherwise than by this bequest of £250 or £500 a year; but it is admitted that those other benefits are not made by the will conditional upon his performing the duties referred to. He might, therefore, take all the benefits given to him by the will, except

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this provision of £250 or £500 a year, as the case may be, without taking any part in the management of the business. But, in my opinion, this disposition in his favour of the annuity is a gift upon condition—a gift to him upon the condition that he performs the duties of manager; and, if he did not perform those duties, he would not be entitled to take any part of the £250 or the £500, as the case might be. He elected to perform those duties, and thus entitled himself to receive those sums, and, in my opinion, he took those sums as gifts under the will, and must bear the duty which sect. 4 imposes upon anything he took by way of gift. He might have taken a different course. At the time of the testator's death, he might have said, "I decline to take any part, in conjunction with the trustees, in the management of the business, unless I am paid a salary, and I will have nothing to do with the conditional legacy given to me by the will." If he had taken that course, he certainly could not have been compelled to perform the duties of manager unless he was paid for them; and it may be that the Court would have considered a payment to him for managing the business a proper payment. His employment by the trustees as manager at a salary does not come strictly within the words of the will, because the trustees are only empowered to appoint a manager in conjunction with the son himself. Still it may be that, notwithstanding that clause, the trustees would have had power to pay him a salary as manager. But nothing of that kind took place. He chose to accept the disposition in his favour made by the will, and it was, in my opinion, a gift to him upon which legacy duty is payable.

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The trustees of *Joseph Thorley's* will and the executors of *W. R. Thorley* appealed. The appeal came on for hearing on the 25th of April, 1891.

Napier Higgins, Q.C., and *Macnaghten*, for the Appellants, used arguments similar to those addressed by them to the learned Judge of the Court below.

Vaughan Hawkins, for the Crown, was not called upon.

LINDLEY, L.J. (after stating the provisions of the will, continued):—

Now, the business was carried on by the trustees, and *William Read Thorley* assisted them; or, to use the language of the will, he managed the business in conjunction with the trustees, and the question has been raised by the Crown as to whether these sums of £250 a year are or are not subject to payment of legacy duty. It appears that the claim has not been made until recently. How it has come about I do not know, but the petition which is before us raises no other question than whether these sums can be properly regarded as subject to legacy duty. That depends, of course, on the construction of the Acts of Parliament which impose legacy duty, and counsel for the Appellants are quite right in saying that those Acts, like all other taxing Acts, are to be read strictly; that is to say, they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay. Those principles are perfectly familiar.

The Acts in question are 55 Geo. 3, c. 184, to which I need not particularly refer, and 8 & 9 Vict. c. 76; and it is the 4th section of the latter Act which applies to the present case, and has to be considered. The Act of 8 & 9 Vict. c. 76, which was passed in the year 1845, recites in the 4th section as follows: "Whereas under or by virtue of the said several recited Acts certain duties have been granted, and are now payable upon legacies, and doubts have been entertained whether certain gifts by will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts." That shews, therefore, that there had been some construction put upon the previous Acts which did not give the term "legacy" so extensive a signification as Parliament thought it ought to have, and the statute extends the signification. It says it is expedient to remove such doubts, and then it enacts as follows. [His Lordship then read the section, and continued:—]

Those are very general terms, and the questions we have to consider under that section are, whether this testamentary provision, as I will call it for the sake of using a neutral term, is or is not a gift by a will or testamentary instrument; and, secondly,

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whether it is payable or has effect or is satisfied out of the personal estate of the testator.

Now, is it a gift? Let us take the trustees first. The trustees and the executors, apart from the will, could not charge for their trouble in carrying on the business of the testator. It would be competent to them if they did not like to carry on that business to have nothing to do with it. They need not take it unless they like. No implied right of remuneration would arise from the mere fact that they executed the trusts which they elected to perform. Nor could they in point of law frame a declaration based on any implied contract of payment, for the simple reason that they are the paymasters and payees; they are the persons to employ themselves, and they cannot create an implied obligation to pay out of such a state of things. Therefore if they are to obtain this £250 a year at all they must do so under the will. They cannot get it in any other way. Then is that, or is not that, a gift by the will within the meaning of this section? I cannot in my mind say that it is not. It is said that there was a consideration for it; that the trustees are to give their services, their time, and their attention, and that is perfectly true. But does that alter the question? If they could charge the estate of the testator for their services apart from the will it would alter the question very materially, but they cannot. They cannot get a shilling out of the estate either at law or in equity for their services except under the will. That appears to me to bring this case within this clause, nor do I think that we could possibly hold the contrary without running counter to the reasoning of the Court in the case of *In re Pooley* (1). It is very true that that case did not raise this question of legacy duty, but the decision in it proceeded upon the principle which I have been endeavouring to explain, *viz.*, that a solicitor, who is entitled to charge profit costs under a will, takes a benefit under the will, and therefore is an interested witness, and accordingly if he attests the will, he cannot claim the benefit which the will gave him, which was the right to remuneration for his services. I cannot see in principle any distinction between that case and this. With reference to the other cases

(1) 40 Ch. D. 1.

I will not say anything. I do not think they are close enough to require any comment.

Upon the first part of this analysis of the section I am unable to differ from Mr. Justice *North* in holding that this is a gift by will. It is either that or nothing. If they take it at all they take under the will. It is a gift, on condition, it is true, that they attend to this business and made a profit out of it; because it is a gift to them out of the profits. It is not an absolute gift. Still it is a gift on condition, which is just as much a taxable legacy as a legacy to an executor for his trouble in winding up the estate. That has always been taxed, and must be taxed unless we are to depart from the language of the section which imposes the duty.

Now I pass on and consider the second point, whether this provision of £250 a year is payable or has effect or is satisfied out of the personal or moveable estate or effects of the testator. If it is not payable out of his estate, out of whose estate is it payable? It is payable out of somebody's. It is obvious that this is property which the testator had power to dispose of. It is quite true it would not exist if the business were not carried on profitably more or less through the exertions of those who carry it on; but to say it is not payable out of the personal estate or out of the effects, or is not to be satisfied out of his personal estate, appears to me to involve the proposition that the business with the profits thereof were not his to dispose of. Therefore, when we come to consider it we find that these sums are legacies taxable under the statute to which I have referred. That is the view taken by Mr. Justice *North*, and it appears to me to be right.

BOWEN, L.J.:—

I am of the same opinion. The first question is whether this annuity is a gift of £250 a year. Well, if it is gratuitous, it is a gift. If you give a thing for valuable consideration, it is not a gift. Does the taker therefore take it as a gratuity from the testator or not? The counsel for the Appellants say it is not a gift of £250 a year, it is not a gift of an annuity, but it is a gift of a right to do something under the will, which may be capable

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of valuation. Let us analyse that proposition and see whether it will stand.

What is the right which it is suggested is given? It is a right to claim money if some services are rendered. The money is to come out of the testator's estate—that is certain; but if the taker renders services, that expression is ambiguous. If he renders services, then to whom does he render them? He can no longer render them to the testator. He must render them to the estate, or those who represent the estate. That is to say, according to the argument, it is a gift of a right to money out of the estate, if he renders services to the estate—services for which he could not charge except by the will.

Now, is not that, when you analyse it and write it large, exactly equivalent to a right to have money out of the estate upon a condition that he does something for the executors? That is what it is. It is not a gift for a valuable consideration; it is a gift upon a condition. Now a gift of a legacy is not the less a gift because it is given on a condition. That is clearly established, and the truth is that this is a conditional gift of money out of the testator's estate from the profits which that estate will give; but the right to receive it depends on the fulfilment of two conditions subsequent, namely, that the estate shall bear the fruit which is necessary to satisfy the annuity, and that the services shall be rendered.

It is said that these are conditions which deprive the gift of the character of bounty and make it cease to be a gift; or, as Mr. *Higgins* very clearly put it, that the payment will not come entirely out of the estate, but that the estate of the testator is swollen by the enterprise and the services which are rendered. But a gift is not the less a gift because there is a condition attached to it. That we know; that is established law; and the truth is, that the person who is the legatee has a right to elect whether he will take the gift on a condition or not. If he thinks it will not pay him to take it, he need not take it; but if he takes it subject to legacy duty, it does not lie in his mouth to say the legacy duty is not chargeable, because he is ready to do the services for the remuneration, minus the legacy duty. Therefore the legacy minus the duty represents the bounty of the testator.

With regard to the son, it is really the same thing over again. He claims under the will. He does not claim under any contract. The same argument and the same reasoning apply.

I ought to say, with regard to *In re Pooley* (1), that the view of Lord Justice *Cotton* and the view of Lord Justice *Lindley* in that case seem to be at variance with the argument addressed to us on behalf of the Appellants, and by that case I think we are morally, so to speak, bound.

KAY, L.J.:—

I agree with the other Lords Justices. It seems to me that the two questions in this case involve the same point, and I will take the second first. It is said that these annuities were not given out of the estate of the testator. There is a very simple mode of trying that. Suppose the testator had left the business to his trustees in trust to pay the profits to *A.* for his life, and afterwards to hand over the whole business to *B.* There is no question whatever that he could have made a gift of that kind. Therefore he had power to deal with the subsequent profits of his business for the benefit of a tenant for life. If so, he could give the subsequent profits of his business. If he could give the subsequent profits of his business, it follows as a matter of course, he could give an annuity out of the subsequent profits of his business. Therefore the subsequent profits of his business out of which this annuity was to come, were beyond all question his personal estate which he could deal with. They were, in truth, the fruit of the business which belonged to him. One might put many illustrations. Suppose this testator had been the possessor of a large orchard of trees, and he had said that he gave all the fruit of those for ten years after his death to *A.* He could have done that. The fruit would not have been existing in his lifetime, but nevertheless, he would have had power to dispose of it, and in that sense it would have been his, because it would have been the fruit of his estate—that which, at the time of his death, he could dispose of, giving a limited interest in it. I think the second question is, if you consider it, almost too clear for argument. If the testator could give the profits of his

(1) 40 Ch. D. 1.

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business after his death, then the annuity out of the profits of that business was part of his estate which he could dispose of.

That does not, of course, entirely solve the first question; and to try that I take the case of the son, who is not one of the executors, but a person to whom, if he chose to carry on the business in conjunction with the executors and trustees, the testator gave out of the profits of that business a certain annuity. Now, it seems to me that the simple mode of trying whether that annuity is subject to legacy duty or not, is to suppose that instead of an annuity the testator had given a lump sum of money. Suppose he had said, "I give to my son out of my estate £10,000 as a legacy on condition that he shall assist my trustees for ten years, or during his life, to carry on my business." The son has the power of choosing. If he does not think that a sufficient remuneration, and he will not assist, then of course he would not take the legacy. The son must be taken to know that it would be subject to duty. Therefore, if he accepted it, and upon the condition that he was to have this remuneration for his services, he would know that the thing he was to get would be that sum minus the legacy duty which the law imposes upon him, and it was his to take or refuse as he pleased. If he takes it, how on earth could he turn round and say, "I will not pay the legacy duty"?

The argument has been a very ingenious one, and the most striking form in which it was put by the counsel for the Appellants was this: Suppose, they said, this son had been a manager of the business up to the time of the testator's death, and had been in the habit of receiving £500 a year for managing the business, and the testator had said, "I give to my son £500 a year, upon condition that he shall go on managing the business as he has done." Then, they say, it would have been very hard to treat that as a legacy. But that it would be very hard is not a reason why it should not be a legacy, if it is a legacy. Is it a legacy or not? How does the son take it? How would he claim it? He would come to the trustees, supposing he accepted the position, and say, "I will go on, and I will take this." He would say, "By the will you are directed to pay me £500 a year." Well, that is claiming under the will. A thing

which is claimed under a will, being the gift of the testator, is a legacy. I cannot conceive, even in that case, how the son, if he accepted the gift by the will, could say, "I have accepted this, I have accepted the condition under which it is given. I claim it under the will; but I say it is not a legacy."

The argument was also put thus: Supposing, it was said, the testator had made a gift of £5000 to his son, not upon condition of his giving valuable services, but upon condition of his releasing a debt of £2000 which the testator owed him. Then it was said, surely the son would not have to pay the duty on the whole £5000. I do not know how the office would deal with that. But it seems to me probable that he would not. Why? For this simple reason: In that case the residuary estate would be increased by the £2000, which otherwise would have to be paid out of it. The residue would pay increased duty — namely, the duty payable on that sum of £2000, so that if the legatee were made to pay the duty on the whole fund, the estate would have to pay the duty twice over. Now, the analogy is imperfect, and that does not apply to a gift of this kind, where the valuable consideration which is given to the testator's estate as a condition of the legacy, is a thing which is not taxable and does not pay duty. Therefore, there is a broad and plain distinction between those two cases.

I am unable to see the difference between a legacy of a lump sum to a man upon condition that he shall perform services to the testator's estate, and a legacy of an annuity to a man upon the same condition. Each seems to me to be distinctly and plainly a legacy, and I agree that there is really no hardship in the matter, because if the consideration, if you like to call it such, which the legatee has to give by performing the duties for the testator's estate be too onerous, he is not bound to say he will accept the legacy. He may say, "I decline it on those terms." Unless we were to hold this, it would seem to me to follow inevitably that the ordinary case of a gift to executors of a legacy for their trouble in performing the trusts of the estate, ought not to pay duty. It has always been held that such a legacy should pay duty, and certainly, so far as I know, in nine cases out of ten, such a legacy is a very insufficient remuneration indeed for the

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trouble which executors have. Very often it is a mere complimentary legacy—a few guineas or something of that kind. A man's time may be taken up for years. He may be exposed to the continuous litigation which trustees and executors frequently are exposed to, and all his remuneration is a few guineas, and yet that has to pay duty. Unless we were to overrule that, it would be impossible to distinguish this case. We should be overruling that, it seems to me, if we were to say in this case that the legacy was not subject to duty. I think the decision here was perfectly right, and the appeal must be dismissed with costs.

Solicitors: *Collyer-Bristow & Co.; Solicitor to Inland Revenue.*

W. W. K.

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NORTH, J.
Feb. 21.
C. A.
April 30.

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[1867 G. 162.]

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 79 [*Revised Ed. Statutes, vol. ix., p.* 646]—*Compulsory Purchase of Land—Payment of Purchase-money to Person in Possession—Property held for Residue of Term—Reversioner unknown—Right to value of Reversion after Expiration of Term.*

A house, which was held for the residue of a term of 300 years, to expire in 1878, was in 1866 taken compulsorily by a public body under the provisions of the *Lands Clauses Consolidation Act*, 1845. No rent had been paid by the tenant for many years, and the reversioner was unknown. The value of the house was ascertained, and in 1869 the value of the leasehold interest was paid to the tenant, and a sum representing the value of the reversion, was paid into Court. In 1890, twelve years after the term had expired, no claim having been made in the meantime to the value of the reversion, the tenant applied that the fund in Court might be paid out to him, as the person who was in possession of the house at the time when it was taken:—

Held (affirming the decision of *North*, J.) that, as the tenant had never had any possession, even inchoate, of the reversion at the time when the house was taken, he was not the person "in possession" of the house within the meaning of sect. 79 of the Act, and was not entitled to the fund.

Re Evans (1), and *Ex parte Winder* (2) distinguished.

Ex parte Chamberlain (3) doubted.

SUMMONS in the above suit, on behalf of *C. J. Jolland*, asking that a sum of £1268 12*s.* 6*d.*, New Consols, and a sum of

(1) 42 L. J. (Ch.) 357. (2) 6 Ch. D. 696. (3) 14 Ch. D. 323.

£8 10*s.* 1*d.* cash, which were respectively standing in Court to the credit of "*Ex parte The Commissioners of Her Majesty's Works and Public Buildings,* In the matter of the *Courts of Justice Concentration* (*Site*) *Act,* 1865, the owner or owners in fee simple of No. 13 *Clement's Lane,* in the parish of *St. Clement's Danes,* in the county of *Middlesex,*" might be transferred and paid to the Applicant.

The house No. 13 *Clement's Lane* was purchased by *Nicholas Gedye* in 1856, and it was assigned to him by a deed dated the 6th of May, 1856. At the time of his purchase it was stated by his vendor that his title was derived under a long term of years, the date of the commencement of which was unknown, but that in an old deed there was a recital that at Michaelmas, 1771, the term had still 107 years to run, so that it would expire at Michaelmas, 1878. The house was accordingly assigned to *Gedye* for the residue of the term, and for all other the estate and interest of the vendor (if any). No rent had been paid for the house by *Gedye's* predecessors in title for many years, and no rent was ever paid after *Gedye* acquired the house, and it was not known who the reversioner (if any) was. On the completion of his purchase *Gedye* believed that, by virtue of the *Statute of Limitations,* he either was, or soon would become, the absolute owner of the house in fee simple, and in that belief he, on the 6th of February, 1864, granted a lease of the house to *William Usher,* as his tenant, for a term of twenty-one years from the 29th of September, 1863. In 1865 the above-mentioned Act was passed, which empowered the above-mentioned Commissioners to acquire certain property, including *Gedye's* house, for the purpose of a site for the Royal Courts of Justice. The *Lands Clauses Consolidation Act,* 1845, was incorporated with the Act. The Commissioners gave notice to *Gedye* that they required the house for the purpose of the Act of 1865. *Gedye* made a claim for compensation, on the footing that he was the owner of the house in fee, and on the 23rd of April, 1866, the amount of compensation payable to him was assessed by a jury, under the provisions of the *Lands Clauses Consolidation Act,* 1845, at £1110. On the 13th of October, 1866, *Gedye* sent an abstract of his title to the solicitors of the Commissioners. Upon investigating the title to

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Gedye's house and other adjoining houses, the Commissioners' solicitors discovered that on the 27th of July, 1578, a field, upon which the house No. 12 *Clement's Lane* and other adjoining houses were afterwards built, was demised by *Edward Clyfton* to *William Crouch* for the term of 300 years from the 24th of June, 1578, at the yearly rent of £5 for the whole field. A claim was sent to the Commissioners' solicitors by some persons who alleged that they were entitled to the reversion, subject to this lease, but the claim was not prosecuted. Under these circumstances the Commissioners declined to pay to *Gedye* the compensation which had been assessed on the footing of his being the owner in fee of the house or to accept his title.

In November, 1867, the above suit was commenced in the Court of Chancery by *Gedye* against the Commissioners to enforce specific performance of the contract for the purchase of the house by them.

On the 9th of March, 1869, upon the further consideration of the suit, an order was made by Vice-Chancellor *Malins*, by consent and without prejudice to the Plaintiff's claim to the reversionary interest of and in the house, by which it was declared that the Plaintiff's leasehold interest therein was to be taken at the value of £500, and, after a statement that £200, part thereof, had been already paid to the Plaintiff by the Commissioners, it was ordered that £300, the residue thereof, with interest thereon, should be paid to him by them, and that upon such payment the Plaintiff should assign his leasehold interest to the Commissioners. And it was further ordered that the Commissioners should, on or before the 30th of April, 1869, pay into Court, to the credit of the above matter, and in the suit, the sum of £705, the amount found by a surveyor, appointed under sect. 85 of the *Lands Clauses Consolidation Act*, 1845, to be the value of the reversion in fee simple, expectant upon the determination of the Plaintiff's leasehold interest. And directions were given for the investment of the £705 in Consols, and the accumulation of the dividends thereon. And liberty was given to the Plaintiff to apply in respect thereof.

On the 22nd of March, 1869, the £705 was paid into Court by the Commissioners. The Commissioners, under the provisions of

sect. 77 of the *Lands Clauses Consolidation Act*, 1845, executed a deed poll vesting the reversion in themselves. The £705 was afterwards invested in pursuance of the order. The funds to which the present summons related had arisen from the investment and accumulation.

The present Applicant had acquired the interest of *Gedye* by assignment from him. He, in January, 1872, obtained a stop order in respect of the fund. *Gedye* had died insolvent, and no representation had been taken out to his estate. No claim to the reversion had been made by any one since the expiration of the term.

The summons was heard before Mr. Justice *North* on the 21st of February, 1891.

Borthwick, for the summons:—

If the house had not been taken by the Commissioners, *Gedye*, or the Applicant claiming through him, would, by this time, have acquired by possession a title to the reversion in fee. The fact that the house was taken by the Commissioners cannot affect any rights as between the owner of the term and the reversioner. The money took the place of the house, and, as it has remained in Court unclaimed for over twelve years, the Applicant should be treated as having acquired a title by possession, just as if he had been in actual undisturbed physical possession of the house; *Ex parte Chamberlain* (1); *Ex parte Winder* (2); *Re Evans* (3). In principle those decisions apply to the present case, though in them the adverse possession had commenced actually before the compulsory taking of the land. In two of them the possessory title was not complete when the land was compulsorily taken. By sect. 79 of the *Lands Clauses Consolidation Act*, 1845 (4), the

(1) 14 Ch. D. 323.

(2) 6 Ch. D. 696.

(3) 42 L. J. (Ch.) 357.

(4) 8 & 9 Vict. c. 18, s. 79: "If any question arise respecting the title to the lands in respect whereof such moneys shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shewn to the satisfaction of the Court; and unless the contrary be shewn as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their

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person in possession of land, as being the owner thereof, at the time of its being purchased or taken under the Act, is to be deemed to hav been lawfully entitled thereto, until the contrary be shewn to the satisfaction of the Court.

[NORTH, J., referred to *Ex parte Hollingsworth* (1).]

Vaughan Hawkins, for the Commissioners, was not called upon.

NORTH, J.:—

I think this application must fail. The matter stands thus: A lease was granted in 1578, of a field which reached from *Clement's Inn* to *Chancery Lane*, to a person named *Crouch*, under whom, no doubt, *Gedye* derived all such interest as could be passed on through *Crouch* to him in the house, No. 13 *Clement's Lane*. *Gedye* was in possession of this house, which had been built on part of the field for the residue of the term, which expired in 1878. The whole field was subject to a rent of £5 a year, and, though it is proved that *Gedye* was never called on to pay any part of that rent, yet there is no proof that the rent was not, down to the time when the lease came to an end, paid to the reversioner by some one of the occupiers of the other houses which had been erected upon the field. There is nothing, therefore, to displace the *primâ facie* right of the reversioner to enter into possession when the lease expired in 1878. *Gedye* acquired the house in 1856, and it was conveyed to him for the residue of a long term of years, the commencement of which, it was stated, was unknown; but which, as appeared from a recital in an old deed, would expire at Michaelmas, 1878, and for all other the estate and interest of his vendor. I do not understand that as meaning that the conveyance to him referred to the term as expiring in Michaelmas, 1878, and I have no doubt that it is the term which was created in July, 1578. The house was conveyed to him for the residue of this long term, and for all other the

possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly."

(1) 19 W. R. 580.

estate and interest of his vendor. I have no doubt that he acquired whatever his vendor could convey to him, but apparently the vendor had no right to convey to him and he has not shewn a title to, anything more than the residue of the term. In 1864, *Gedye* sublet the house to a tenant of his own for a term which was to last longer than 1878. That underlease, therefore, operated as an assignment of all his interest to the sub-tenant, instead of as an underlease proper. Then the Commissioners required the house for the purpose of the site of the Courts of Justice. They found the tenant in possession, and they settled with him, and obtained possession of the property about 1867. Then in 1866 they proceeded to negotiate with *Gedye*, and it was arranged that they should buy his interest for a sum to be ascertained by the verdict of a jury. A difficulty arose about this. If *Gedye* had made out a good title to the fee the matter would have been settled, but he could not make out his title to the fee. Thereupon recourse was had to sects. 76 and 77 of the *Lands Clauses Act*, and the purchase-money was paid into Court and invested under sect. 78, and the Commissioners obtained possession of the property.

A suit was commenced by *Gedye* against the Commissioners, for the specific performance of their original agreement with him; but that fell through, because no title to the fee could be made by him. An arrangement was made, which was embodied in the order of the 9th of March, 1869, by which, by consent, and without prejudice to *Gedye's* claim to the reversionary interest in the premises, it was declared that his leasehold interest therein was to be taken at the value of £500, and provision was made for the payment of that £500 to him. The sum of £705, representing the value of the reversion, as distinguished from *Gedye's* leasehold interest in the premises, was paid into and left in Court and has been accumulating ever since, and the Applicant, in whom has become vested all *Gedye's* interest in the property, asks that the accumulated fund may be paid out to him.

In my opinion, he has not shewn any title to it. It is clear that the term has expired, and he has been paid the £500, which is admitted to be the full value of his interest in the term. But he says he is also entitled to the fund which represents the value

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of the reversion, on the ground that he was in possession of the property at the time when it was taken by the Commissioners; and, therefore, entitled under sect. 79 to the purchase-money. He was, no doubt, in receipt of the rent from his sub-tenant, and that is equivalent to possession under sect. 79. But he was only receiving a rent which was payable during the remainder of the long term, and he had no possession extending beyond that term. As regards the reversion after the expiration of the term, he had no possession of any sort or kind. He had never entered into possession of the property in respect of the reversion. He had merely been in possession as tenant; it being his duty as tenant to give up that possession to some one else when the reversion should fall into possession. He never had any inchoate possession of the reversion, and he never did any act amounting to a claim to the reversion.

It has been decided under sect. 79 of the *Lands Clauses Consolidation Act* that when a person is found in possession of land, and dealt with upon that footing, if the possession is conferring on him an inchoate title, as in *Re Evans* (1), where a person had been in adverse possession for eighteen years, and in *Ex parte Winder* (2), where a person had been in adverse possession for nineteen and a half years, such possession is a possession within sect. 79 of the *Lands Clauses Act*. I should have followed those cases if in the present case there had been any similar possession—even for a very much shorter time than there was in them. But, in the present case there was no such possession at all. *Gedye* never entered into possession of the reversion as reversioner in any sense; and I cannot say that the case of a person who has been in possession and has already an inchoate title, which will in a year or two mature into a fee simple, has any relation whatever to the case of a person who has never actively or constructively had any possession of the reversion.

I am of opinion that the Applicant has never had an inchoate title to this fund, which represents [illegible]ue of the house after the expiration of the lease; and, t[illegible]at being s[illegible], his application fails, and the summons must be dis[illegible]issed with costs.

W. [illegible] C.

(1) 42 L. J. (Ch.) 357. (2) 6 Ch. D. 696.

From this order *C. J. Jolland* appealed. The appeal was heard on the 30th of April, 1891.

Cozens-Hardy, Q.C., and *Borthwick*, for the Appellant, cited *Ex parte Winder* (1); *Ex parte Chamberlain* (2); *Re Evans* (3).

Vaughan Hawkins, for the Commissioners, was not called on.

LINDLEY, L.J.:—

This is a very ingenious attempt to get something which does not belong to the Applicant, and, naturally, under these circumstances, we want authority to shew how it is to be done.

The case is simple enough. Mr. *Gedye* was entitled to the residue unexpired of a long term of years, created we are told, in 1578, and it ran out in 1878. Before it had run out, he granted a lease, which was expressed to expire after the expiration of his own lease, sometime in 1884; but some years before his own lease had expired—in 1865—the property comprised in the lease was taken compulsorily under the *Lands Clauses Act*. His title, when investigated, was perfectly clear, and it was found and certified by the Chief Clerk's certificate of the 28th of May, 1868. He was then entitled to this property for the residue of the term of years to which I have alluded, and no title was made by him to the fee simple, and he had none. He was not in occupation as an occupier claiming the fee simple; he was in occupation as the owner of an unexpired term of years. That was the position of affairs. The value of the land was ascertained to be £1205, that was the fee simple; of that sum £500 represented the value of his unexpired leasehold interest, and it was paid to him. The residue of £705, the ascertained value of the reversion, to which he was not entitled, was paid into Court. Now further time has elapsed, the reversioner has not appeared, nobody has come to ask for payment of that £705, and this gentleman, who has no more right to it than I have, says, "Give it to me." We, he cannot claim it under any known principle of common law. His claim is based upon the 79th

(1) 6 Ch. D. 696. (2) 14 Ch. D. 323.
(3) 42 L. J. (Ch.) 357.

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section of the *Lands Clauses Act*, which I will read. [His Lordship read the section, and continued:—]

Now, when this money was paid, this gentleman was not in possession of the land as owner thereof; but was in possession of the land and profits as termor. He never was in a position to bring himself within this section. It has been decided by Vice-Chancellor *Hall* in *Ex parte Winder* (1) that a person in possession as occupier, that is to say, claiming the fee simple, and in whose favour the *Statute of Limitations* has run, is within this section. But Vice-Chancellor *Bacon* went further in *Ex parte Chamberlain* (2) where the man had been in as a leaseholder. I doubt whether the case of *Ex parte Chamberlain* did not go a little too far. The case of *Ex parte Winder* I follow; *Ex parte Chamberlain* I doubt. But, be that as it may, this gentleman has not been in possession after the expiration of his term. He was bought out before that. The statute has not run in his favour, and cannot run in his favour. The appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. The Applicant was not, when the commissioners took possession and paid £705 into Court, in possession as owner. He got £500 for his leasehold, but £705 was paid into Court on the ground that he was not in possession as owner, and was paid in in respect of the reversion. He has no more claim to the reversion than I have. But he says that now the £705, which was paid in for the reversion, ought to be paid to him, although he is not the reversioner. On what ground? That if things had happened differently, if affairs had gone otherwise, and had gone happily for him, he might in time not have become the reversioner, but have displaced the reversioner by a possessory title. He says, "if I had not sold the leasehold compulsorily when I did, I might have stayed on, after my lease had expired, by wrong, and that wrong, in twelve years, if nobody had interfered with me, might have ripened into right, at the end of the twelve years, as against all except persons whose interests are saved by the statute; and," says he, "probably or

(1) 6 Ch. D. 696. (2) 14 Ch. D. 323.

possibly there are no such persons." The answer to him is, "You had not got the reversion in the first instance. You did not stay on after the lease had expired. You were not there so as to be able to stay on. It is impossible, therefore, as you never had possession of the land, that any possession could ripen into right in your favour. You have not got the substance, and you have not even got the right to anything except the hope (which never has been realized) of the shadow." It seems to me that the case does not come within the statute at all.

About *Ex parte Chamberlain* (1) I can only say I very greatly doubt if that decision is right, though I do not desire to bar myself, if the point should ever occur again. I greatly doubt whether it was not shewn there that the man was not in occupation as owner within the meaning of the statute.

KAY, L.J.:—

This case seems to me to be abundantly clear. If this person, who was in possession as leaseholder, had sold his leasehold interest before it had expired, and had put the purchaser into possession, it is quite impossible that the vendor could afterwards have come and said, "I am entitled to the reversion." He says there is a difference because he did not sell it voluntarily. He sold it; and of course there is no difference because he did not sell it voluntarily, unless the statute, under which he was compelled to sell it, makes a difference. Now this is the first time I ever heard it seriously argued that the *Lands Clauses Act* alters the title and rights of the vendor of property which is taken compulsorily. This Act was passed for no such purpose, and with no such object in any sense. Sect. 79, which is referred to, applies to a case where a man is in occupation of land as owner of the fee simple, but has a difficulty in making out that title, then it provides that he shall be held to be entitled to the purchase-money of that land unless somebody else comes and proves a better title. That is reasonable enough. That does not alter his title; it only gives him the money for that land of which he is in occupation as owner of the fee simple unless somebody else can make a better title to that land, or that money. But how in the world can

(1) 14 Ch. D. 323.

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sect. 79 give to a leaseholder the fee simple, which is practically what is contended for? The leaseholder had the leasehold interest; while it existed, he has been paid the value of that leasehold interest. The value of the fee simple has been paid into Court, because he was not entitled to it, and it was not known who would be. He never had the possession which could by any possibility ripen into a right to the fee simple, because he has not shewn that his possession was anything except that of a leaseholder, and that possession had been taken from him before the term expired. His claim to that money seems to me to be a perfectly hopeless claim, and it could not be supported in any way unless he could make out that the statute gave him a right to the fee simple, which the facts would not give him a right to, if he had voluntarily made the sale which he has made involuntarily. I think the appeal must be dismissed with costs.

Solicitors: *C. M. Hotson; Solicitor to the Treasury.*

M. W.

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[1883 J. 123.]

Will—Construction—Gift of Income of Fund during Life or Widowhood—Gift of Legacies out of Fund after Widow's Death.

A testator directed his trustees to pay the income of a trust fund to his wife during her life, or, until she should marry again; and from and after her marrying again he directed his trustees to pay her an annuity of £2000 during her life; and from and after the death of his wife he directed them to levy and pay certain legacies thereinafter bequeathed, all which, although payment was postponed until after the decease of his said wife, he directed to be taken as vested immediately upon his own decease. And the testator gave £5000 to his trustees to be divided among such charitable institutions as his wife should by her will name and appoint; and gave his residuary estate to three persons in equal shares. The testator's wife survived him, and married again:—

Held (reversing the decision of *North*, J.), on this point, that there being no ambiguity in the words of the gift, and no doubt appearing on the will as to the intention of the testator, all the legacies directed to be

paid at the death of the widow were to be postponed till that event happened, and were not payable on the determination of her life estate by her second marriage. The principle of construction established by *Jones* v. *Westcomb* (1) held not applicable.

THIS was an action to administer the estate of *John Tredwell*, who died in December, 1875, having duly made a will and codicil respectively dated the 13th of May, 1874, and the 30th of July, 1875.

The testator by his will appointed his wife, *Maria Tredwell*, now *Maria Fletcher*, and three other persons now dead, executors and trustees of his will. After giving immediate pecuniary and specific legacies, including legacies to servants, a legacy of £10,000 to his wife, and legacies to his executors, he devised his real estate to the use of his wife during her life provided she should so long remain his widow. He bequeathed his personal estate not specifically bequeathed, and devised his real estate, subject to the interest of his wife therein, unto and to the use of his trustees upon trust either to continue in their present state of investment or otherwise sell and convert into money his said residuary personal estate, and "at their or his discretion at any time after the decease or marrying again of my said wife, or in her lifetime with the consent of my said wife whilst she shall be in the occupation or receipt of the rent and profits of my said real estate," to sell and dispose thereof, with power to suspend the sale and manage the estates in the meanwhile. And as to the monies to arise from the sale and conversion of his residuary real and personal estates, he directed his trustees in the first place to pay his debts and general and testamentary expenses, and the pecuniary legacies thereinbefore bequeathed, and the legacies thereinafter next mentioned—that is to say, pecuniary legacies to the amount of £4250—and after payment thereof to invest the surplus as therein mentioned, and to hold the investments "upon trust to pay unto or otherwise permit and suffer my said wife or her assigns during her life or until she shall marry again, to receive the annual income of the said trust fund for her sole and separate use without power of alienation, and from and immediately after her marrying again, then in lieu of

(1) 1 Eq. C. Ab. 245.

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the provisions hereinbefore made for my said wife, upon trust to pay unto my said wife during the remainder of her life for her own separate use without power of anticipation an annuity of £2000;" and upon further trust to pay to *Eliza Skilliter*, during the life of the testator's wife, provided *Eliza Skilliter* should so long live and remain single, an annuity or clear yearly sum of £250 as therein mentioned; but in the event of *Eliza Skilliter* marrying in the lifetime of his wife with the approbation of his trustees, then in lieu of the said annuity he bequeathed to her for her separate use a legacy of £5000, which should go in diminution of the legacy thereinafter given to her. The will then proceeded as follows: "And from and immediately after the decease of my said wife upon trust thereout to levy and pay the legacies hereinafter given and bequeathed, all which said legacies, although payment thereof is postponed until after the decease of my said wife, I direct shall be deemed and taken as vested immediately upon my own decease"—then followed the names and descriptions of forty-seven legatees, with the amounts given to each, including the following descriptions: "To *Eliza Skilliter*, hereinbefore named, the sister of the said *Susan Emerson*, a legacy of £20,000, subject to be reduced by the sum of £5000, as hereinbefore mentioned; but in the event of the said *Eliza Skilliter* marrying and being portioned by me in my lifetime, the amount of such portion is to be deducted from the said legacy of £20,000;" "to each of the eight children of my late sister, *Mary Bourne*, £1000." And the testator gave to his executors a legacy of £5000 upon trust to divide the same among such charitable institutions as his wife should by her will name and appoint. The testator devised and bequeathed his residue in equal thirds to persons who all survived the testator.

The testator's codicil, after giving further legacies to servants, was as follows: "And from and after the death of my said wife I give and bequeath unto *Eliza Bradley*, the daughter of my late sister *Sophia* by her second marriage, a further legacy of £2000; to her brother, the said *John Pigott*, a further legacy of £1000; and to *Henry Worton Elliott* a further legacy of £4000; and, inasmuch as *John* and *William Bourne*, the two sons of my late sister, the said *Mary Bourne*, in my said will named, are already

provided for, I do hereby revoke the legacy of £1000 given to each of her eight children, and instead thereof I give and bequeath unto the seven other children of my said late sister a legacy of £1000 each; and as to the sum of £5000 given and bequeathed by my said will, upon trust for such charitable institutions as my said wife shall by her will make and appoint, I direct that the same shall be retained and paid out of such part of my residuary personal estate as is legally applicable to charitable legacies. In all other respects I do hereby confirm my said will."

The testator's estate was sufficient to provide for all legacies, and leave a large surplus.

A judgment for the administration of the estate having been obtained, a summons was taken out by Mrs. *Fletcher*—

1. For the appointment of representatives in the matter of the several legatees whose legacies were directed to be levied and paid after the decease of the testator's wife.

2. That it might be determined whether said legacies had, by reason of the marriage of the testator's widow, become immediately payable, or whether they were not payable till after her decease.

3. Whether the legacy of £5000, by the testator given to his trustees on trust to divide the same amongst such charitable institutions as his wife should by will appoint, ought to be forthwith appropriated, and if so, how the income of the appropriated fund ought to be applied.

4. If the said legacies ought not to be forthwith paid or appropriated, who was entitled to the income of the testator's residuary estate after providing the annuities given by his will.

Persons had been appointed in Chambers to represent the legatees, and the rest of the summons was heard before Mr. Justice *North* on the 19th of November, 1890.

Theobald, for the summons.

Rigby, Q.C., and *Methold*, for the pecuniary legatees:—

In gifts over of this description the Court will, in ascertaining the expressed intention of the testator, look at the scope of the whole will, and not merely at the bare literal meaning of the

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words of the gift taken alone. If an intention can be gathered from the whole will that when a testator refers in a passage of gift to one contingency only as of the two, second marriage or death, he is to be taken to have meant the gift to take effect on the happening of either contingency, in spite of the language of that part of the will expressing the contrary. There is a long series of authorities bearing out this proposition, most of them in cases the converse to this, or differing from it in facts; some of them approaching the present case, not only in principle, but in circumstance, of which the following are examples: *Jones* v. *Westcomb* (1); *Meadows* v. *Parry* (2); *Murray* v. *Jones* (3); *Osborn* v. *Bellman* (4); *Mackinnon* v. *Sewell* (5); *Avelyn* v. *Ward* (6); *Warren* v. *Rudall* (7); *Hall* v. *Warren* (8); *Brock* v. *Bradley* (9); *Davies* v. *Davies* (10); *Luxford* v. *Cheeke* (11); *Bainbridge* v. *Cream* (12); *Stanford* v. *Stanford* (13); *In re Dear* (14).

Ingle Joyce, for the Attorney-General:—

Apart from the circumstance that the particular charities to participate in the £5000 given for charitable purposes have not been designated by the testator, and cannot be ascertained till the death of his wife, that legacy stands on the same footing as to the time at which it is payable as the other legacies expressed by the will to be not payable till after the death of the testator's wife. To that extent I adopt the arguments used on behalf of the pecuniary legatees. As the legacy is a charitable legacy—if there is any difficulty by reason of want of any existing definition of the objects to take, the Court will apply the income *cy-près* until Mrs. *Fletcher* dies, and has by will defined the objects: see form of judgment in *Chamberlayne* v. *Brockett* (15) given in *Seton* on Decrees (16); *Attorney-General* v. *Bishop of Chester* (17); *Salusbury* v. *Denton* (18).

(1) 1 Eq. C. Ab. 245.
(2) 1 V. & B. 124.
(3) 2 V. & B. 313.
(4) 2 Giff. 593.
(5) 2 My. & K. 202.
(6) 1 Ves. Sen. 420.
(7) 4 K. & J. 603.
(8) 9 H. L. C. 420.
(9) 33 Beav. 670.
(10) 30 W. R. 918.
(11) 3 Lev. 125.
(12) 16 Beav. 25.
(13) 34 Ch. D. 362.
(14) 38 W. R. 31.
(15) Law Rep. 8 Ch. 206.
(16) 4th Ed. p. 585.
(17) 1 Bro. C. C. 444.
(18) 3 K. & J. 529.

Cozens-Hardy, Q.C., and *William Druce*, for two of the residuary devisees and legatees, who are Plaintiffs in the action, and *Chataway*, for the other residuary legatee:—

To hold that under this will payment of the legacies deferred by the testator till after the death of his wife was accelerated by her marriage would be to go contrary to the express words of the testator and to make a will for the testator. In the cases cited the Court could not give effect to the words of the will as they stood, or there was some hiatus to be filled up; here there is nothing of the kind, the scheme of the will is in itself complete, and there are indications that the testator did not intend the deferred legacies to take effect before the period named, though the wife's interest determine by reason of her second marriage. The dispositions in favour of *Eliza Skilliter* are inconsistent with such acceleration. The form of the gift of the charitable legacy is also inconsistent with any intention on the part of the testator that the legacy should be paid before his wife's will could come into operation.

NORTH, J. (after reading the material portions of the testator's will, as before stated, continued):—

The testator died, without altering these dispositions, leaving a very large estate, sufficient to provide for all annuities, and pay all these legacies, and leave a large surplus. His widow has recently married again; and, in consequence, her life interest in the whole has come to an end, and the question arises whether the group of legacies of £149,500 given by the will (subject to the variation in the codicil) are payable at once, or whether the legatees must wait for payment until the widow dies.

The latter view is that maintained by the residuary legatees, who say that these legacies are only given from and immediately after the death of the testator's wife, and that this is followed by a statement in the next line that their payment is postponed till after her death; and if these were the only passages in the will bearing on the subject, their contention could not be disputed. It is said, on the other hand, that an examination of the whole will shews that by referring in the passage in question to the death of his wife, the testator was merely adopting a

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compendious phrase to express the determination of the interest given to her in his whole estate during her life provided she did not marry again. And if this is the true construction of the will as a whole, the general intention thus shewn must prevail, notwithstanding the somewhat conflicting language of this particular clause by which these legacies are given.

Looking at the will as a whole, it is clear that, subject to specific and pecuniary bequests of very small amounts comparatively, the wife is preferred to any one else as the recipient of the whole income; and the payment of the legacies now in question, though they vest indefeasibly at the testator's death, is certainly so far deferred that it is not to interfere with the wife's receipts of the income of the whole estate so long as she is entitled to receive it. But, in the event of her marrying again, her interest in the whole income comes to an end; and, thenceforth, during the remainder of her life, she is to receive an annuity of £2000 a year only; and, except to the extent of the annuity of £250 to *Eliza Skilliter*, the income of the rest of the estate is not in terms disposed of; though, of course, the residuary bequest is large enough to prevent any intestacy with respect to it.

Although the object of postponing the payment of these legacies, while the testator's wife takes the whole income, is obvious, no reason is given why they should be postponed further. It seems entirely improbable that this should be done in order to give the legatees of the residue, during the remainder of the widow's life, the income of the fund appropriated to provide for these legacies, although the capital of such fund never could come to them: and still more improbable that, if there was any such intention, it should not be mentioned in the will, but left to operate through a general residuary disposition. Again, I think that the express direction that the legacies are to vest at once, though not to be paid until after the wife's death (whatever that may mean), indicates very strongly that it is, by reason of the prior interest of the wife only, that the payment was postponed.

In considering such cases as the present, it is always important to bear in mind the position of the testator, and to regard

the state of things existing at the time, and the contingency or event to be provided for or guarded against; and I cannot help feeling strongly, from the whole scope of the will, that the testator was intending to prefer his wife, while his widow, to every one; and, subject to her paramount interest, to prefer the pecuniary legatees now claiming to the residuary legatees, and not the latter to the former. In several passages in the will, the testator speaks of his wife's interest being for life, determinable on her marrying again; and when, in the gift of these legacies, he speaks of his wife's death, I am satisfied that he was referring to the coming to an end of her life interest: that is to say, her life interest determinable as already mentioned.

The reports are full of cases in which the Courts have been compelled to depart from the meaning which words, if standing alone, would have, in order to give effect to the general intention of the testator is indicated by his will. In the well-known case of *Jones* v. *Westcomb* (1) a testator provided for a child, of which his wife was then enceinte, and if such child died under twenty-one, over; in fact, the wife was not enceinte, but the gift over was held to take effect, and there are many similar cases. So in *Brock* v. *Bradley* (2) there was a gift to a lady for life, with remainder to her children, and in default, to her absolutely, if she survived her husband; and, if she died in his lifetime, over. She neither died before, nor survived her husband, for she never married; but it was held that the limitation to her absolutely took effect. There are other cases on the same lines which come nearer to the present, for a series of authorities, from *Luxford* v. *Cheeke* (3) downwards, have established that, where a testator devises property to his wife for life, if she shall so long continue his widow, and, if she shall marry, over; the gift over takes effect upon the determination of her estate, whether she marries again or not; upon her marriage if she marries, upon her death if not. I need not do more than refer to the recent case of *Browne* v. *Hammond* (4) before Lord *Hatherley*, and *Wardroper* v. *Cutfield* (5) before Vice-Chancellor *Kindersley*, and to the

(1) 1 Eq. C. Ab. 245.
(2) 33 Beav. 670.
(3) 3 Lev. 125.
(4) Joh. 210.
(5) 33 L. J. (Ch.) 605.

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decision of Sir *G. Jessel* in *Underhill* v. *Roden* (1), where he says, "It is a great pity when a general rule of this kind is well established that Judges should not follow it. The general rule is extremely well expressed, if I may say so, in *Eaton* v. *Hewitt* (2) by a very distinguished Judge in these terms: 'It is a rule now well established that where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that in the event of her marrying the property shall go over to another, although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the tenant for life, the gift over is held to take effect, even though the tenant for life does not marry.'"

It is clear, therefore, that in the present case, if the direction had been for payment of these legacies on the marriage again of the wife, they would have taken effect on her death, without having married again. The principle seems to be that where a testator who has given an estate to his wife for life, if she so long remains unmarried (that is to say, during her widowhood), gives it over on her marriage, he must be taken to be referring to the determination of her life estate, upon whichever of the two events such determination takes place.

In the present case, the reference is to the death of the wife instead of her marriage; but the same principle applies to both, and I do not think the case less strong where the death of the wife is the event referred to (which must necessarily happen, although it may not be the cause of the determination of the wife's estate) and not the contingent event of marriage.

This also is borne out by the authorities: see *Bainbridge* v. *Cream* (3), where a testator gave property to his wife during her life, or until she marries again; and after her death, or second marriage, whichever shall first happen, to trustees for sale, who were to divide the proceeds among his nephews and nieces, or such of them as should be living at the death of his wife. The wife having married again it was held that the property was immediately distributable among the nephews and nieces living at the time of her second marriage, although, the widow being

(1) 2 Ch. D. 494, 497. (2) 2 Dr. & Sm. 184.
(3) 16 Beav. 25.

still alive, it was impossible to say which of the nephews and nieces would be living at her death. Again in *Stanford* v. *Stanford* (1), where the testator gave income to his wife for life, provided she so long continued his widow, and after some intermediate limitations which failed, then after the death of his widow, among the testator's brothers and sisters who should be living at her death. The widow having married again, Mr. Justice *Chitty* held that the property was immediately distributable among the testator's brothers and sisters living at the date of her second marriage; although she was still alive, the class to take, if ascertainable only at her death, might possibly have been very different. And in *In re Dear* (2), where property was given to the testator's wife in trust for the benefit of the children so long as she remained unmarried, and on her death the estate was to be divided among the children then surviving, Mr. Justice *Kay* held that, upon the widow's marriage, the property vested in the children living at the date of her marriage, although in that, as in the two previous cases cited, the effect of the decision was probably to alter the class of persons to take. Under these circumstances I should be laying myself open to the reproach of Sir *G. Jessel* in *Underhill* v. *Roden* (3) if I did not follow those cases.

But it is said (and this is always a legitimate matter for consideration) that there is something special in the present will, which distinguishes this case, viz.: the legacies to Miss *Skilliter* and the widow's charitable donees by will, which are said to be irreconcilable with the construction suggested. Miss *Skilliter* has, after the widow's second marriage, an annuity of £250 during the widow's life, if and so long as she remains single. If she marries in the widow's lifetime, then she is to take at once £5000 in lieu of the annuity, in diminution of the legacy of £20,000 afterwards directed to be paid to her on the widow's death. It is said that, if these words are read literally, no difficulty can arise. But, in my opinion, no difficulty arises if the principal legacy of £20,000 is payable to Miss *Skilliter*, as I hold it to be, on the widow's marriage. When that legacy

(1) 34 Ch. D. 362. (2) 38 W. R. 31.
(3) 2 Ch. D. 494.

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has been paid in full, there can be no further sum of £5000 to receive; and, as the £5000 will have been received, the annuity, for which that sum is to be the commutation, will have come to an end. And this is exactly the result arrived at from reading the will as giving the annuity of £250 to Miss *Skilliter* —not "during the life of my said wife," but—"during the continuation of my wife's life interest, determinable as aforesaid," corresponding exactly with the words, making the capital payable on the determination of such interest.

The further suggestion is that the charitable bequest of £5000 is inconsistent with the view I have taken. I do not see how it throws any light whatever upon the bequest of the legacies I have been considering. It is a wholly separate independent gift, not stating in terms whether it is to be paid at the wife's death or marriage.

The codicil to the testator's will was scarcely referred to by either side; but, in my opinion, it does not in any way militate against the construction I have placed on the will. With respect to the seven legacies of £1000 each, given to the children of the testator's sister, *Mary Bourne*, the codicil does not state in terms when they are to be paid, as these legacies do not fall under the express bequest in the codicil "from and after the death of the testator's wife;" but, in my opinion, they are payable at the same time and in the same manner as the eight legacies of £1000 each, instead of which they were given, *i.e.*, at the time when the widow's life estate is determined by her second marriage. With respect to the three further legacies of £2000, £1000, and £4000, expressly bequeathed by the codicil from and after the death of the testator's wife, I see no ground for holding them to be payable before the time expressly mentioned in the codicil. They are not enlargements of the legacies given to the same legatees by the will, they are expressly called further legacies, and I do not see any such connection between the language of the will and codicil as to justify me in saying that, because, by the aid of an explanatory context in the will, the reference to the widow's death refers to the termination of her determinable life interest, this reference to her death in the codicil, without such explanatory context, has

any other than its ordinary meaning. It will be observed that this construction does not involve the appropriation of a provision for these legacies, the income of which will go to the residuary legatees in the meantime, as the sum appropriated to secure the widow's annuity of £2000 will be far more than enough to provide for these legacies and the charitable legacy of £5000, when the time of her death arrives.

The answer therefore to the second question will be that the several legacies bequeathed by the testator's will and codicil set out in the schedule to this order, have by reason of the marriage of the testator's widow, become immediately payable, but that the further legacies given by the codicil of £2000 to *Eliza Bradley*, £1000 to *John Pigott*, and £4000 to *Henry W. Elliott*, are not payable until the widow's death. The Schedule will contain the several legacies in the will to the number of forty-seven to which I have particularly referred, other than the eight of £1000 each, revoked by the codicil, and will also include the seven of £1000 each, given by the codicil instead thereof.

The third and fourth questions relate to the £5000 to be divided among charitable institutions, as the testator's wife shall by will appoint. In my opinion, that legacy clearly is not payable until the widow's death, and as the testator has not directed any severance of, or appropriation for that legacy in the meantime no interest is payable in respect of it. If any appropriation is made for the purpose, not being part of the funds appropriated, in respect of the £2000 annuity, the income accruing during the widow's life will belong to the residuary legatees, and these questions must be answered accordingly.

D. P.

C. A.

From this judgment the Plaintiffs, who were residuary legatees, appealed. The appeal was heard on the 30th of April, 1891.

Sir Horace Davey, Q.C., *Cozens-Hardy*, Q.C., and *W. Druce*, for the Appellants:—

There is no ambiguity in the present will, the words of the testator are quite clear and reasonable, and their literal

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interpretation gives rise to no intestacy or other difficulty. Therefore the cases relied on by the learned Judge in the Court below have no application.

[They were stopped by the Court.]

Willis Bund, and *Chataway*, for the other residuary legatee.

Rigby, Q.C., and *Methold*, for the pecuniary legatees:—

The general principle which has been well established ought to be followed in this case, that where a testator gives property to a woman till her death or till she marries and then directs that in one of those two events the property shall go over, the gift over is held to take effect if either of the two events happens. It is to be construed as a remainder to take effect on the determination of the woman's interest. It does not matter which of the two events is specially mentioned by the testator. The reason of the rule is evident, for the testator has expressed an intention that the woman's interest should cease on either event happening, and if the gift over did not take effect at the same time when her interest determined one of the alternatives would be unprovided for. This rule ought to be adhered to unless there is some plain reason appearing in the will to the contrary: *Eaton* v. *Hewitt* (1); *Underhill* v. *Roden* (2). Therefore it is not sufficient to say that the words in the gift over are unambiguous; the intention of the testator in the whole scope of the will must be looked to; and in the present case it does not appear clear from the whole will that the testator meant the pecuniary legacies to be postponed till his widow's death, and therefore the ordinary rule ought to prevail: *Warren* v. *Rudall* (3); *Fonereau* v. *Fonereau* (4); *Avelyn* v. *Ward* (5); *Bainbridge* v. *Cream* (6); *Luxford* v. *Cheeke* (7); *Stanford* v. *Stanford* (8); *Browne* v. *Hammond* (9); *In re Dear* (10); *Underwood* v. *Wing* (11). The testator could not have wished to postpone the payment of the

(1) 2 Dr. & Sm. 184.
(2) 2 Ch. D. 494.
(3) 4 K. & J. 603.
(4) 3 Atk. 315.
(5) 1 Ves. Sen. 420.
(6) 16 Beav. 25.
(7) 3 Lev. 125.
(8) 34 Ch. D. 362.
(9) Joh. 210.
(10) 38 W. R. 31.
(11) 4 D. M. & G. 633.

legacies till his widow's death for fear of her annuity being deficient, because the estate is amply sufficient for both. The peculiar terms of the provisions made for *Eliza Skilliter* confirms our construction of the will.

Cozens-Hardy, in reply.

LINDLEY, L.J. :—

This is an appeal from the decision of Mr. Justice *North*, and the question raised by the appeal is when certain pecuniary legacies are payable; namely, whether they should be payable on the death of the testator's widow or whether they became payable on her second marriage. That question, of course, turns entirely upon the construction of the will of the testator, who was a man of considerable property.

[His Lordship then read the material parts of the will and codicil as before stated, and then proceeded :—]

The event which has happened, and which has given rise to this controversy, is this : The testator's widow has married again, and the pecuniary legatees insist that although by the terms of the will their legacies are given to them only upon the death of the wife, yet upon the true construction of the will, having regard to certain well-settled principles of construction, those legacies are payable upon the expiration of her life interest, that is to say, upon her marriage.

Now, the more closely the will is examined, and the closer attention is paid to the wording of it, the less is it possible to hold that these legacies are payable before the time which the testator has mentioned. There is no ambiguity in the will at all. There is no expression which gives rise to any doubt or difficulty. But we are asked to look out of the will into authorities, and I protest against having recourse to authorities for the purpose of raising a difficulty. I understand having recourse to authorities for the purpose of grappling with a difficulty when it arises, but it appears to me a misuse of cases on construction to depart from a plain instrument and to find from authorities something which you do not find in the instrument itself, and which you import from the authorities into the instrument, and

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thereby raise a doubt, and then have recourse to the same authorities for the purpose of seeing how the doubt is to be met. It appears to me that is fundamentally erroneous, and I think our duty is upon a plain will to adopt the construction which the words require. Upon this will, which, to my mind, is abundantly plain, it appears to me that the legatees are wrong, and that they must wait until the widow is dead; they must wait, that is to say, for their legacies until the time at which alone the testator has said they are to be paid.

With regard to the authorities. Out of deference to those who have made so much of them I will say a few words. The principle contended for by the counsel for the legatees is a principle with which we are all familiar—which is as old, at all events, as the case of *Jones* v. *Westcomb* (1), and which is very well summed up by Mr. *Jarman* in his book on Wills (2), where he says this: "Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i.e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio* either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication." Now, as an illustration of that, one may put such a case as this: a gift to *A.* for life determinable on some particular events, and then a gift over to *B.* on her death or on some other event, which determines the estate. That has been held to apply on the determination of the life estate from any of the specified events. It being in the case supposed manifestly the intention of the testator that, subject to the provision given to *A.*, the rest was to go to *B.*, and *B.'s*

(1) 1 Eq. C. Ab. 245. (2) Vol. ii. chap. l.

enjoyment was postponed simply for the benefit of *A.*, there being a defect in the language but no defect in the intention—the intention being seen to be exhaustive and to apply to all possible cases, when *A.* ceases to have any interest in the property. That is the theory. To me it is intelligible, it commends itself to one's good sense; but when we come to apply that doctrine to a case of this kind, the very first thing is to see from the whole document this necessary implication—to see something in the will which convinces the mind that the testator must have meant that these legacies should be paid at some time or other different from what he has said. I cannot find it. On the contrary, the whole controversy is entirely attributable to the fact that this gentleman was a wealthy man. The case would not have been argued if his property were such that there were just enough, for example, to pay this annuity of £2000. It could not then be said that any of these legacies were to be paid to the detriment of the widow. He meant exactly what he has said, namely, that the legacies are to be paid when the widow dies, and that the residue of his property, including, of course, the difference between her life estate, and the annuity of £2000 would go to the residuary legatees. When you come, therefore, to apply these cases you feel at the very outset the difficulty that you do not see that the testator meant anything of the sort. There is no necessary implication. We should be departing from all sound principles if we allowed ourselves to go outside the will into the consideration of cases in order to raise a question which does not arise upon the true construction of the will. It appears to me that the learned judge has gone wrong by allowing himself to be seduced from the study of the will into the study of the cases before any necessity for doing so arose. I think the Appeal must be allowed, and that these legacies must be paid at the death of the lady, and the decree must be varied accordingly.

BOWEN, L.J.:—

I am of the same opinion, and for the same reasons. I entirely agree with what the Lord Justice has said about the necessity of attending to the will itself, and not being led aside into a study

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of precedents which consist of interpretations put upon other wills by the Court. Here the meaning of the words appears to me to be plain. I can see nothing in the nature of the gifts or in the framework of the will which justifies one in departing from the plain meaning of the words on the ground of any supposed intention of the testator. We have been pressed by authorities which relate to a class of cases wholly different—cases of gifts over. Now, where a gift over is expressed to take effect on the discontinuance or defeasance in some specified manner, or on the happening of some specified event, of a preceding gift or limitation, it is true that if you can see from the deed or from the nature of its provisions that really the intention of the testator was that the executory gift should take effect on any failure whatsoever of the preceding limitation, whether it was the specified event or whether it was any other event of any kind, then you must give effect to the intention of the testator. It is immaterial in such a case, as Chief Justice *Lee* says in one of the cases which were cited before us, whether the first gift or limitation fails in its inception or fails in the result—whether it fails, in other words, because it never came into existence, or whether, having come into existence, it fails in the particular manner specified by the testator. But, as Lord *Cranworth* points out, in the case of *Underwood* v. *Wing* (1), when he is dealing with these authorities, those cases all proceeded on the doctrine that the event on which the gift over was to come into operation was an event implied by, if not expressly indicated by, the language of the will. That is to say, you must find in the will and the nature of the provision, something that raises an implication of the intention of the testator. Here the intention of the testator seems to me to be marked clearly in the opposite direction by his language, and for the reasons which have been given by the Lord Justice as to the construction of the particular dispositions of the will, which I will not repeat. I am of opinion that we cannot here apply a doctrine which would be incongruous and altogether beside the mark to the construction, or rather for the purpose of misconstruction, of a will which, in its own language, is clear, intelligible, and not unreasonable.

(1) 4 D. M. & G. 633.

KAY, L.J.:—

I confess I think that the construction of this will is without any ambiguity or grammatical difficulty of any kind whatever. The very words that have to be construed are these: "from and immediately after the decease of my said wife upon trust thereout" (which means out of my estate), "to levy and pay the legacies hereinafter given and bequeathed; all which said legacies, although the payment thereof is postponed until after the decease of my said wife, I direct shall be deemed and taken as vested immediately upon my own decease." Now that those words can mean anything grammatically except what they express, that the legacies are to be paid on the death of the wife, and that payment is to be postponed until that event, I suppose that no one who reads this will could doubt for one single moment. Then look at the scheme of the will. The scheme is this: The testator seems to have had no children; he had a wife who he supposed would be his widow; he leaves to his wife all his real estate for life *durante viduitate*, and then to fall into the residue. He leaves to his trustees all his residuary personal estate upon trust for his wife, as long as she shall remain unmarried to receive the whole income of it. If she marries she is to receive £2000 a year; and then follow, subject to another interposed annuity to *Eliza Skilliter*, the words which I have quoted, and the final provision in the will is an absolute gift of all the residue of the estate, which would be residue real or personal, to persons he names—gifts not upon any condition whatever, but a simple residuary bequest without any contingency or precedent condition at all. What is the meaning of a will framed like that? Surely there is no hesitation or doubt about it. The primary object of the testator's bounty was his own widow. He means her to be provided for whatever else shall happen, and the estate only goes to his nephews, nieces, sisters and brothers, comparatively distant relatives compared with the wife and children, subject to the provision made for his wife. What can be more natural than that a man making a provision for his wife in this way should say to himself, "I am a wealthy man now. I do not know exactly what my residue will be at my death. I will make my

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wife safe in any event. She shall have the life interest, and if she marries again she shall have an annuity of £2000 for her life. Those are the primary dispositions of my will, and I will give these legacies, which amount to a very large sum" (over £100,000, I believe) "upon her death," obviously for the reason that the testator did not mean to interfere with the provision that he made for his widow, and did not intend that these legatees should come in and take their legacies until those provisions had been completely and entirely satisfied and ended by the death of his wife. That seems to me the scheme of the will, and it seems to me so plain that to depart from the words and say the legacies shall be paid *pari passu* with this annuity of £2000, would be not merely a departure from the plain grammatical construction of the will, but would be an essential departure from the scheme of this will, which would violate the testator's intention, as I gather it, on the face of the will, in a most material respect.

That is how I read the will; but before I leave it I think there is another indication which seems to me so clearly in the same direction that it is impossible not to notice it. He says, after having given the annuity to his widow if she marries again, "and upon further trust, to pay unto *Eliza Skilliter*, hereinafter named, for her sole and separate use and benefit without power of anticipation during the life of my said wife, provided the said *Eliza Skilliter* shall so long live and remain single, an annuity or clear yearly sum of £250 by equal half yearly payments, the first payment to be made within six calendar months after my decease." Now, I pause there. That is plainly an annuity to commence from his death and to last as long as both *Eliza Skilliter* and his widow shall jointly live and *Eliza Skilliter* shall remain single. He goes on: "But in the event of the said *Eliza Skilliter* marrying in the lifetime of my said wife with the approbation of my said trustees, then, in lieu of the said annuity, I give and bequeath to her for her separate use a legacy of £5000, which shall go in diminution of the legacy hereinafter given to her." And then, among what I will now call the deferred legacies—the legacies payable on the death of the wife—is a legacy of £20,000 to *Eliza Skilliter*, so that he contemplates that if

she marries in the lifetime of the wife she will be entitled to a sum of £5000, which will be in anticipation to that extent of the £20,000 which is given her on the death of the wife, shewing plainly that he knew the £20,000 would not be payable till the death of his wife. Moreover this also follows. Supposing the widow should marry first before *Eliza Skilliter*, and then *Eliza Skilliter* should marry after the marriage of the widow but in her lifetime, according to the exact words of the will, the annuity would go on after the marriage of the widow till *Eliza Skilliter* herself marries, and then the annuity to *Eliza Skilliter* would cease, and she would then become entitled to £5000. But according to the contention of the other side, she would have received the £20,000 immediately on the marriage of the widow. Therefore the suggested construction would involve this testator in contradictions which are most serious. If that was his intention it would be absurd to say she shall have £5000 in anticipation of a legacy which is hereafter given to her, for it might be that she would have received the legacy according to the construction which is now attempted to be put upon the will before she married. Then again suppose this, suppose she did not marry at all; according to this construction of the will, the annuity would go on until the death of the widow and she would have received the £20,000 upon the marriage of the widow. It is quite plain the testator did not mean her to have the £20,000 and the annuity as well, any more than he meant her to have the £20,000 and the £5000. The £5000 is given in terms in lieu of the annuity, and both this £5000 and the annuity are to be paid to her in the wife's lifetime. That is another indication, it seems to me if it were wanted, to make the construction of this will absolutely beyond question.

The learned Judge has arrived at his conclusion in a manner which I, with all possible respect to him, venture to think the most dangerous road that can be taken in construing a will. Instead of taking this will, making up his mind what it means, and then seeing whether there are any decided cases which prevent his holding the true construction of this will to be according to the words of it, the learned Judge seems to me to have followed just the contrary course of reasoning. He seems to have

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applied his mind to a series of decisions, and then, arguing from the decisions to the will, to have thought himself bound to put an unnatural construction upon the words of this will in order to conform with those decisions. In the first place, I do not think the decisions apply at all. The decisions are simply of this kind. I take the simplest illustration of them—a gift to a wife *durante viduitate*, or let us put it in more specific words, the gift to a widow for life, or until she marry again, and upon her death to *B.*, not mentioning that it is to go over to *B.* on the marriage again. There, from the nature of the gift and limitation, the Court has to supply what it has considered to be an evident imperfection in the language. I agree it was perhaps a strong step to take originally, but as Lord Justice *Bowen* has said, it was arrived at by an implication from the rest of the will of what the testator must have intended. There was a necessary implication that *B.*'s estate was to take effect on the determination of the provisions made for the widow, and so the gift over on the death of the widow has been read to mean on determination of the provision made for my widow, I give it to *B.* Let us take those words and apply them to this will. On the determination of the provision made for my widow these legacies are to be paid. That is exactly what the Plaintiffs would not like, because that would not make the legacies payable till the death of the widow. The provisions for the widow include an annuity of £2000 which is to last even if she does marry, till her death, and therefore, if you really take the sense and meaning of that class of authorities and apply them to this will, it would not produce, in my opinion, the result which the Respondents have been contending for. I entirely dissent from the view that such provisions apply to legacies given in this way at all. I put during the argument, a case in which that provision might be made to apply to legacies. Supposing the legacies had been given in this way: A gift to the wife for life (I leave the annuity out) terminable upon her marriage again and then a gift upon the death of the wife, not mentioning the marriage again, of legacies to *A.*, *B.*, *C.*, and *D.*, to the end of the alphabet if you like, and the residue to *Z.* There the legacies would be given as part of the residue, and the gift of the residue would be upon the same condition as the gift

of the legacies, and I can quite conceive that the rule I have been referring to, which is a rule applicable to gifts over, might apply to legacies given in that way as part of the residue. But this will is not framed in that way. I pointed out to counsel that the gift of the residue is not made to depend upon the death of the wife or upon her marriage again, or on any other condition whatever. It is a simple gift of residue: "I give all the residue of my property to *A.*, *B.*, and *C.*" Therefore there is no reason of that kind for applying this rule, which only relates to imperfect limitations over, to the gift of the legacies in this way.

For these reasons, which I only venture to express because of my respect for the learned Judge from whom we are differing, not that I differ in any way from the other Lords Justices who have given their opinion, I agree that this decree should be reversed and the order should be altered in the way which Lord Justice *Lindley* has suggested.

LINDLEY, L.J.:—

There will be a declaration that the legacies in Schedule *A.* are not payable till the testator's widow's death. Then the second declaration will be: this Court doth declare that if any sums are appropriated to answer the said legacies, not being part of the funds appropriated in respect of the 2000*l.* annuity the income will belong to the residuary legatees.

Solicitors: *Whittington, Son, & Barker; Spencer Whitehead,* agent for *Milward & Co., Birmingham; Emmet, Son, Stubbs, & Melhuish; Cooper & Sons, Manchester; The Solicitor to the Treasury.*

M. W.

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[1890 R. 2050.]

Power—Release—Tenant for Life—Power to appoint among Children—Death of Child intestate—Release of Power by Tenant for Life—Right to Transfer of deceased Child's share—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 52.

A father, who was tenant for life under the trusts of his marriage settlement, had power to appoint the trust funds among the children of the marriage. In default of appointment the funds were to be held in trust for the children in equal shares, to be vested interests at twenty-one or marriage. The only issue of the marriage were three sons, one of whom died in early infancy. The other two sons attained twenty-one, and one of them died a bachelor and intestate after the death of his mother. Administration to his estate was granted to his father. The father then executed a deed by which he absolutely released his power of appointment, and he called on the sole surviving trustee of the settlement to transfer to him a moiety of the trust funds. The trustee declined to do so without the direction of the Court. The father issued an originating summons, by which he asked for an order declaring that, in the events which had happened, he was entitled to a moiety of the trust funds, and to have the same transferred to him:—

Held, that, though the release was valid, the Court would not in any way assist the Plaintiff in obtaining a transfer of the fund.

The summons was accordingly dismissed.

Cunynghame v. *Thurlow* (1) followed.

ORIGINATING SUMMONS by *J. W. Radcliffe*, as Plaintiff, against *C. E. Bewes*, as Defendant, asking for an order declaring that the Plaintiff, as tenant for life under the settlement, dated the 26th of July, 1852, made on his marriage with his late wife, and as administrator of the estate of his son *D. Radcliffe*, deceased, was entitled in the events which had happened to a moiety of the property comprised in the settlement, and to have the same moiety conveyed, transferred, and paid over to him.

The Defendant was the sole surviving trustee of the settlement.

The Plaintiff was married to his late wife on the 27th of July, 1852.

By the settlement the property therein comprised was vested

(1) 1 Russ. & My. 436, n.

in trustees, upon trust to pay the income thereof to the husband during his life, and after his death to pay the income to the wife (in case she should survive him) during her life, and after the death of the survivor of the husband and wife the trustees were to hold the trust property and funds in trust for the child or children of the marriage, as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor of the husband and wife should by deed or will appoint, and in default of appointment in trust for the child or all the children of the marriage, if more than one in equal shares, to be vested interests in sons at twenty-one and in daughters at twenty-one or marriage.

There were only three children of the marriage, viz., three sons; *D. Radcliffe*, born on the 14th of June, 1853; *W. F. Radcliffe*, born on the 23rd January, 1855; and *B. St. George Radcliffe*, born on the 23rd April, 1856. *B. St. George Radcliffe* died on the 21st of July, 1857. The wife died on the 9th of July, 1878. The son, *D. Radcliffe*, attained twenty-one, and died on the 27th of July, 1881, a bachelor and intestate; and on the 16th of November, 1882, letters of administration to his estate were granted to the Plaintiff.

On the 19th of February, 1875, the Plaintiff and his wife appointed a sum of £160 to the son *D. Radcliffe*, and released their life interests therein. No other appointment was made.

On the 9th of July, 1890, the Plaintiff executed a deed poll, by which he released and discharged the property subject to the trusts of the settlement from the power of appointment vested in him as the survivor of himself and his wife, to the intent that the same power might be absolutely extinguished, and that he might be absolutely excluded from exercising the same.

The Plaintiff then called on the Defendant to transfer to him a moiety of the trust property. The Defendant declined to do so, except under the direction of the Court. The summons was then issued.

Sir *Horace Davey*, Q.C., and *George Lawrence*, for the Plaintiff:—

The donee of a power can effectually release the power, even

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though the release will operate in his own favour: *Smith* v. *Houblon* (1); *Shirley* v. *Fisher* (2). The principle of those decisions applies to the present case. *Cunynghame* v. *Thurlow* (3) will, no doubt, be relied upon by the Defendant as shewing that the Court will not aid the Plaintiff in carrying out his object. But that case has been misunderstood; it does not really apply to a general power. No principle was there laid down; there was merely an exercise of discretion by the Court, and this is shewn by the comments of Lord Justice *Cotton* in *In re Little* (4).

Cozens-Hardy, Q.C., and *Warrington*, for the Defendant:—

Cunynghame v. *Thurlow* has never been doubted. The principle there laid down is applicable to every power, general or special: *Sugden* on Powers (5). It applies exactly to the present case. The decisions relied on for the Plaintiff go no further than we are willing that the Court should go now. We have no objection to a declaration of right being made such as was made in *Smith* v. *Houblon*. The Court there declined to order a transfer of the fund. In *In re Little* (6), the Court of Appeal expressly recognised *Cunynghame* v. *Thurlow* as being good law, though the precise point did not then arise for decision. No order for transfer of the fund was made in *Shirley* v. *Fisher*, and there is no case to be found in which the Court has assisted a tenant for life by making such an order. Sect. 52 of the *Conveyancing Act*, 1881, does not affect the question; it did not alter the law as to the right of the donee of a power to release it; the section is only a statutory declaration of the law: *Smith* v. *Death* (7); *Horner* v. *Swann* (8); *West* v. *Berney* (9).

[NORTH, J., referred to *Weller* v. *Ker* (10).]

In that case the power was conferred on trustees.

Lawrence, in reply:—

Cunynghame v. *Thurlow* has never since been followed under

(1) 26 Beav. 482.
(2) 47 L. T. (N.S.) 109.
(3) 1 Russ. & My. 436, n.
(4) 40 Ch. D. 424.
(5) 8th Ed. p. 90.
(6) 40 Ch. D. 418.
(7) 5 Madd. 371.
(8) T. & R. 430.
(9) 1 Russ. & My. 431.
(10) Law Rep. 1 H. L. Sc. 11.

similar circumstances. So much doubt has been thrown upon it that the Court may now deal with the matter on principle. If a declaration of right is made, in accordance with *Smith* v. *Houblon* (1), an action will lie against the trustee for the fund, and this shews that the Court ought to direct a transfer. In *In re Little* (2) Lord Justice *Cotton* only meant to say that *Cunynghame* v. *Thurlow* (3) shewed that the Court had a discretion.

NORTH, J. (after stating the facts, continued):—

If the case were unfettered by authority, I do not see why an order should not be made declaring the right of the applicant to a moiety of the trust fund, and also directing the Defendant to pay or transfer that moiety to him. But, in my opinion, I am precluded by the authorities which have been cited from making such an order. In the first place there is *Cunynghame* v. *Thurlow*, which was decided by Vice-Chancellor *Shadwell* in 1832, and which, so far as I know, has never been doubted from that day to this. The facts were very similar to those of the present case. By a marriage settlement a fund was vested in trustees, upon trust for the husband and wife and the survivor of them, and after the decease of the survivor, upon trust for the children of the marriage as the husband and wife should by deed jointly appoint, and in default of appointment as the survivor should by deed or will appoint; and, in default of and subject to such appointment, for the children of the marriage in equal shares, such shares to be vested interests in sons on their attaining twenty-one, and in daughters on their attaining that age or marriage. There were seven children of the marriage, one of whom died in infancy, and therefore took no share of the trust fund. *Edward*, the eldest, attained twenty-one and died, having bequeathed the residue of his personal estate to his brother *David*, and appointed executors. *Robert*, another of the sons, attained twenty-one and died, having made a will by which he appointed his father his executor, and bequeathed to him all his personal estate. The father, who survived his wife, appointed four-fifths of the fund to three of the children in equal shares, and by the

(1) 26 Beav. 482. (2) 40 Ch. D. 424.
(3) 1 Russ. & My. 436, n.

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same deed he released the unappointed share from his power of appointment. The other one-fifth therefore went in default of appointment among the other three children, one of whom was the son *Robert*, and the father stood in his place as regarded his one-third of the one-fifth. The father and all his surviving children, except one who was an infant, and the representatives of *Edward* filed a bill against the trustees, asking that the one-fifth of the fund which remained unappointed might be transferred to the father. "The Vice-Chancellor was of opinion that the power was extinguished by the release, but that the Court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power." And the order was "that only two-thirds of the remaining one-fifth (being the shares which had become vested in *Edward* and *David*) should be paid to the father, and the remaining one-third of the unappointed share was to continue in the hands of the trustees." As regarded, therefore, two-thirds of the one-fifth, the Vice-Chancellor acted upon the view that the father's power of appointment had been released, and that the persons then entitled to those two-thirds were those of the children who were entitled in default of appointment. He recognised the right of the father and those two sons to make arrangements as to the mode in which their shares should be dealt with. But, with regard to the share to which the father himself had become entitled, in my opinion the Vice-Chancellor did not by the order, as it is given in the report, deal with it at all, either by declaration or otherwise. It is quite clear that he did not make an order for the transfer of it to the father.

That case is undistinguishable from the present. Why then should it not be followed? It is said that some doubt was cast upon it by *Smith* v. *Houblon* (1). In that case a father had an exclusive power of appointment in favour of his children over a fund which, in default of appointment, was limited to them equally. There were three children, and the eldest of them, a son *John*, attained twenty-one, and died intestate and unmarried, and his legal personal representative, the father, mortgaged the one-third, to which as administrator and next-of-kin of his

(1) 26 Beav. 482, 485.

deceased son, he was entitled, and he released that one-third of the trust funds from his power of appointment. The bill (which was filed by the mortgagees, the father, and a daughter *Maria*, who had attained twenty-one, against the trustees) prayed that the rights of all parties might be ascertained and declared, and that the trust funds might be divided and apportioned amongst the parties interested therein, and for a declaration that the son *John's* share on the release of the power became vested in the mortgagees. It also prayed for a transfer of the shares of *John* and *Maria*. Sir *J. Romilly*, M.R., said, "I will merely declare, that the power was effectually released by the deed of 1859, and the rights of the parties consequent thereon." By that, as I understand it, he meant, I will not go so far as I am asked to go, but I will confine myself to making a declaration. What was the declaration which he made? The formal declaration, in accordance with the words of the Master of the Rolls, would have been a declaration that the power had been effectually released, and that the fund had become vested in the children of the marriage under the limitations in default of appointment. There is nothing to shew that the declaration went any further than that. I have not thought it necessary to send to the Record Office for the decree which was actually drawn up, for the report is of course the best statement which I can obtain of what the Master of the Rolls really said. The parties to the suit were all *sui juris*, and capable therefore of consenting to any alteration in the terms of the declaration, and, if the declaration drawn up departed in any way from what the Master of the Rolls said as it appears in the report, I am not satisfied that it would have expressed his deliberate opinion. I do not think that the words which he is reported to have used meant any more than I have already stated, and if the declaration was that which I have suggested, it appears to me that it was in no way inconsistent with *Cunynghame* v. *Thurlow* (1).

Then there is the case of *Shirley* v. *Fisher* (2). There by a marriage settlement a power of appointment over a trust fund was given to the husband (the plaintiff) in favour of the children of the marriage, to be exercised by deed or will. In

(1) 1 Russ. & My. 436, n. (2) 47 L. T. (N.S.) 109.

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default of appointment the property was to be divided equally among the children. There were four children of the marriage, of whom one, having attained twenty-one, died in 1869 a bachelor and intestate. The plaintiff was his personal representative. In 1876 the plaintiff appointed by deed in favour of his three surviving children, but reserved a power of revocation. In 1880 he revoked by deed the appointment made in 1876, so that the property might stand limited as theretofore. The plaintiff had charged his life interest in his deceased son's share in the trust funds, and also the reversion to which he was entitled as sole next of kin of that son. He offered to execute an absolute release of his power of appointment, and claimed a transfer of the deceased son's share on his executing such a release. A good deal of the argument was addressed to the question whether the revocation of the appointment of 1876 was valid, but *Cunynghame* v. *Thurlow* (1) was also referred to. The judgment of Vice-Chancellor *Bacon* was devoted mainly to the question whether the father could reserve a power of revocation and exercise the power so reserved to himself. With that question we are not concerned now. Only at the very end of the judgment do the words occur which it is said assist the Plaintiff in the present case. The Vice-Chancellor held that there was clear power in the father to reserve the power to revoke, and he added (2), "If he reserves that power, and revokes the appointment, the consequence is that the share of the deceased son remains as if the deed of 1876 had never been executed, and although it may, in its result, be beneficial to the father, he owes that, not to the settlement or to any provision in the settlement, but to the legal accident which has happened, and which has vested in him, as administrator of his son, all the interest in this property." The plaintiff's counsel then said, "There will be a declaration, in the terms of the prayer, that, upon the plaintiff executing a release by deed, he is absolutely entitled to a third part, because the eldest son is over advanced." To that, as I understand it, the Vice-Chancellor assented, for the report continues: "His Lordship made a declaration that the appointment of 1876 was effectually revoked by the deed of 1880, and that, upon the

(1) 1 Russ. & My. 436, n. (2) 47 L. T. (N.S.) 112.

plaintiff executing a release by deed of the power of appointment, he would be entitled to one third of the remainder of the trust fund, after bringing into account his share." I cannot, therefore, find that the point for which the case is cited as an authority was substantially argued, and I cannot say that the Vice-Chancellor intended to decide anything inconsistent with *Cunynghame* v. *Thurlow* (1). If he had so intended, I think he would have referred to that case in his judgment, but he did not. In my opinion, therefore, *Shirley* v. *Fisher* (2) throws no doubt upon *Cunynghame* v. *Thurlow.*

The last authority which I must mention is *In re Little* (3), a decision of the Court of Appeal. That did not turn upon the point which was decided in *Cunynghame* v. *Thurlow.* The question was, whether the Court ought to exercise the discretion, which it undoubtedly had under sect. 39 of the *Conveyancing Act,* 1881, to remove a restraint on anticipation which was imposed by a will upon the life interest of a married woman. The property was given in remainder to her children and issue as she should appoint, and, in default of appointment, to her children equally, with cross-limitations in the event of any of them dying under twenty-one without leaving issue. She arranged with her eldest son that his one-fifth share in part of the property should be applied in a specified way for her benefit, and she executed a release of her power of appointment, and then applied to the Court for the sale of the one-fifth share (including her life interest in it), and the application of the proceeds in the manner agreed upon. Both Mr. Justice *Kay* and the Court of Appeal refused to remove the restraint on anticipation. The materiality of the case for the present purpose is that, in the course of his judgment, Lord Justice *Cotton* said (4): "In order to make it possible to hand over a share of this fund Mrs. *Harrison* has released her power of appointment. I will assume that this release is effectual, and that the power of appointment is gone. But the release was executed in order to enable Mrs. *Harrison* to obtain possession of this share, and, even if the release cannot be impeached, I think that the Court ought not to help her to obtain a benefit

(1) 1 Russ. & My. 436, n.
(2) 47 L. T. (N.S.) 109.
(3) 40 Ch. D. 418.
(4) Ibid. 424.

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from executing it. An appointment made for the purpose of enabling the donee of the power to get possession of a share of the fund would clearly be bad. A release of the power with the same object may be good, but I think we should be wrong in exercising our discretionary power in furtherance of that object. *Cunynghame* v. *Thurlow* (1) is in point, and shews that where we have a discretion we ought not to do anything to help a donee of a power to obtain a personal benefit by releasing it." The other Lord Justices agreed in the decision. I understand that to amount to a recognition of *Cunynghame* v. *Thurlow* by the Court of Appeal, so far as it bore on the point then before them. It is, I think, an adoption of *Cunynghame* v. *Thurlow* as a correct decision, and under these circumstances I feel bound to act upon it, there being nothing in the other cases really inconsistent with it. Sect. 52 of the *Conveyancing Act*, which provides that "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power," carries the matter no further, for the law was really the same before the passing of the Act. The result is that I must act upon *Cunynghame* v. *Thurlow*, and as a logical result I must decline to make any declaration upon the summons. I am clearly of opinion that the power has been validly released, but *Cunynghame* v. *Thurlow* shews that the Court ought not to do anything to assist the father in carrying out an object of which it cannot approve. I may add that in any case I should not have seen my way to accede to the application without directing the summons to be served upon the son who is living. It is clear from the decisions that some one besides the father still has an interest in the fund, and I do not see who that some one can be but the son. The trustees will take their costs out of the fund.

Solicitors: *Torr & Co.*, agents for *W. Every, Honiton; Bell, Brodrick & Gray*, agents for *Bewes, Hellard & Bewes, Stonehouse, Plymouth.*

(1) 1 Russ. & My. 436, n.

W. L. C.

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April 23, 25.

In re BRACE.
WELCH *v.* COLT.

[1890 B. 5309.]

General Power of Appointment—Exercise by General Devise—Power of Revocation and New Appointment—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

When a general power of appointment of real estate by deed or will has been completely exercised by deed, a power of revocation and new appointment being at the same time reserved, a general devise of real estate by the subsequent will of the donee of the power will not *per se* amount, by virtue of sect. 27 of the *Wills Act,* to an exercise of the power of revocation and new appointment.

Pomfret v. *Perring* (1) considered.

Charles v. *Burke* (2) followed.

SUMMONS by the trustees of the will of *Kate Brace,* deceased, for the determination of the question, whether a devise of real estate contained in her will operated as an exercise of a power of appointment vested in her by a deed of the 29th of June, 1870.

By a deed dated the 23rd of June, 1866, and made between *Edward Brace* and *Kate* his wife, of the one part, and *G. E. Brace,* of the other part, and duly acknowledged by *Kate Brace, Edward Brace* and his wife granted unto *G. E. Brace* in fee a house called *Heron Lodge* and some land, to hold the same to the use of *Edward Brace* and *Kate* his wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her life, and after the decease of the survivor to the use of *G. E. Brace* in fee. Provided that it should be lawful for *Edward Brace* and *Kate* his wife during their joint lives by any deed executed by them, and for the survivor of them by deed or will, to revoke the uses therein declared, and also by the same or any other deed or will to declare other uses of the same premises.

By the deed dated the 29th of June, 1870, *Edward Brace* and *Kate* his wife, in pursuance of the power contained in the deed of

(1) 5 D. M. & G. 775. (2) 43 Ch. D. 223, n.

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the 23rd of June, 1866, revoked all and every the uses contained in that deed, and in further exercise of the same power declared and appointed that the house called *Heron Lodge* and the land comprised in the deed of the 23rd of June, 1886, should go, remain, and be to the use of *Edward Brace* and *Kate* his wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her life, and after the decease of the survivor to the use of *Georgiana Ellen Colt*, the wife of *G. N. Colt*, for her life, for her separate use, and after her decease to the use of *G. A. Welch* and *W. H. Poyntz* in fee, upon trust for sale, and to stand possessed of the proceeds of sale, upon trust for all and every the child or children of *Georgiana Ellen Colt* by *G. N. Colt*, or any after-taken husband, to be equally divided between them as and when they should respectively attain the age of twenty-one years or day of marriage, and if there should be only one child, in trust for that only child, with a clause of accruer in case any one or more of the children should die under the age of twenty-one years or day of marriage. Provided that it should be lawful for *Edward Brace* and *Kate* his wife during their joint lives by any deed executed by them, and for the survivor of them by any deed executed by him or her or by will, to revoke the uses therein declared, and also by the same or any other such deed or will to appoint and declare other uses of the premises. *G. N. Colt* died in April, 1871. *Edward Brace* died on the 15th of September, 1871.

Kate Brace, by her will dated the 14th of April, 1886, devised all the real estate to which she should be entitled at her decease, and she bequeathed the residue of the personal estate to which she should be then entitled, or over which she might have any disposing power, unto and to the use of *G. A. White Welch*, *H. M. Faber*, and *W. W. Gabriel*, their heirs, executors and administrators respectively, upon trusts for sale and conversion, and to stand possessed of the proceeds upon trust to pay certain specified pecuniary legacies, and to stand possessed of the residue thereof in trust to pay and divide the same unto and between *Edith Georgiana Colt* and *Florence Ellen Faber*, the wife of *H. M. Faber* (two of the children of *Georgiana Ellen Colt*) in equal shares. The testatrix died on the 7th of September, 1890. She had no

real estate other than that which was comprised in the deed of the 23rd of June, 1866.

Georgiana Ellen Colt died in October, 1890. She had six children only. One of them died under the age of twenty-one. The other five were *Edith Georgiana Colt*, Mrs. *Faber*, *George Brace Colt*, *Maud Isabel Colt* and *Harry Shapland Colt*, all of whom attained twenty-one.

The question was, whether the will of Mrs. *Brace* operated, by virtue of sect. 27 of the *Wills Act*, as an exercise of the power of revocation and new appointment reserved by the deed of the 29th of June, 1870.

Quin, for the Plaintiffs, stated the case.

Cozens-Hardy, Q.C., and *R. F. Norton*, for the two daughters, Mrs. *Faber*, and *Edith Georgiana Colt*, and for the trustees of Mrs. *Faber's* marriage settlement:—

There is no authority directly in point, and the question depends on the construction of sect. 27 of the *Wills Act* (1 Vict. c. 26), which provides that "a general devise of the real estate of the testator . . . . shall be construed to include any real estate . . . . which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." Mrs. *Brace* had, at the date of her will and of her death, power to appoint the *Heron Lodge* property in any manner she might think proper. She had power to revoke the existing appointment and to appoint new uses, and that was in effect a power to appoint the property in any way she pleased. It would not be necessary in an appointment by deed to use the word "revoke"; it would only be necessary to manifest an intention to make a new appointment of the property in lieu of the existing appointment. The will ought to be read as if it had said "all my real estate, including *Heron Lodge*": *In re Jones* (1). In *Palmer* v. *Newell* (2), Sir *J. Romilly*, M.R. (3), misinterpreted the effect of *Pomfret* v. *Perring* (4), when he said that that case is "an

(1) 34 Ch. D. 65.
(2) 20 Beav. 32.
(3) 20 Beav. 38.
(4) 5 D. M. & G. 775.

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authority shewing, that although a will does, by virtue of the statute, operate as a general exercise of all powers of appointment, yet that it does not operate as an exercise of a power of revoking a previous instrument." In *Pomfret* v. *Perring* (1), the power of revocation and new appointment was limited to children and the issue of children of the appointor; and, moreover, there was other property to which the subsequent general appointment could apply, and Lord Justice *Turner* said (2): "The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power." The observations of Mr. Justice *Kay* in *Charles* v. *Burke* (3) are also founded on a misconception of *Pomfret* v. *Perring*.

Rigby, Q.C., and *Ingle Joyce*, for the two sons, *G. B. Colt* and *H. S. Colt*; and *J. W. Clark*, for the daughter, *Maud Isabel Colt*, were not called upon.

NORTH, J.:—

I think the point is clear on authority, and I think it would be clear on principle, if there were no authority. [His Lordship stated the effect of the deed of the 29th of June, 1870, and of the will of Mrs. *Brace*, and continued:—]

If the will is an exercise of the power of revocation and new appointment contained in the deed of June, 1870, sect. 27 of the *Wills Act* applies to it, and the two residuary legatees, the two daughters of Mrs. *Colt*, will take the property in question. If, on the other hand, the will does not exercise the power by virtue of sect. 27, the deed of 1870 remains unaffected, the uses declared by it are not revoked, and the five children of Mrs. *Colt* take the property. The proposition is that, by the devise of real estate contained in Mrs. *Brace's* will, this property was disposed of in two ways. First, it is said, the existing uses were revoked, and secondly, other uses were substituted for them, that result

(1) 5 D. M. & G. 775. (2) 5 D. M. & G. 781.
(3) 43 Ch. D. 223, n., 224, n.

being produced (if at all) by sect. 27 of the *Wills Act*, because, but for that section, it is quite clear the contention would have no foundation. The argument must go to this length, that, if a man devises by his will all his real estate, this devise not only, to use the words of sect. 27, comprises the real estate, which he has power to appoint in any manner he may think proper, but it also operates as a revocation of every exercise by him of any general power in favour of any one with respect to which he has reserved a power of revocation, and which is still existing. That is a very startling proposition, and, if the *Wills Act* had been intended to go to that length, one can hardly suppose that there would not have been in it some words indicating that such was the intention. I do not think it is. Wherever there has been a complete appointment under a power, an appointment which entirely disposes of the property, you must get rid of that appointment in some way or another before any further appointment can be made. In other words, you must displace that which has operated as a complete appointment before there can be room for any further exercise of the original power, or, to put it in legal language, you must revoke the existing uses or trusts, and create new ones to take their places. It is not of course necessary that this should be done by technical words. Though there are two things to be done—a revocation of the existing uses and a subsequent substitution of other uses—the two may be done *uno flatu* just as well as by two separate processes. The revocation of the old uses and the declaration of new ones may be contained in different instruments, or they may be in one and the same instrument, and, moreover, it is clear law as well as common sense that the thing may be done, without any express revocation of the old uses, by the use of words which can take effect only if a revocation of the old uses is implied. If a power has been exercised in favour of *A.*, and by his will the donee of the power were to say, "Although I have given the property to *A.*, I now give it to *B.*," that, of course, would imply the revocation of the gift to *A.*, and the substitution for it of the gift to *B.* But, although the two processes may be combined in that way, you must be able to find that the first appointment, so far as it is effectual, is displaced by something which is afterwards done.

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In the present case I cannot find anything to displace the appointment in favour of the five children which is contained in the deed of the 29th of June, 1870. If that appointment is effectual, I cannot see anything to supersede it or to put something else in its place. If and so far as that appointment is ineffectual, the original power remains in force, and may be exercised, but, except so far as the appointment is ineffectual, I do not see what power now remains which can be effectually exercised by the will. Suppose that one of the five appointees were to say, "I do not want the property. I do not wish to take anything under that power, and I disclaim any interest under the appointment in my favour," he could not be compelled to take the benefit of the appointment if he did not choose, and therefore the attempt to exercise the power in his favour and to give him part of the property would have failed. To that extent, therefore, the power would not have been effectually exercised, and, although there would be a valid and effectual appointment as to four-fifths of the property, as to the remaining one-fifth the attempted exercise would have failed to take effect, and there would be a power still subsisting which might be exercised by a general devise of her estate contained in the donee's will. But her will can only exercise the power so far as there is not already any appointment in existence which exhausts the power, and, inasmuch as in the present case there is a valid existing appointment which has not been revoked, there is, in my opinion, no longer any power subsisting which can have any practical effect. No doubt, the existing uses might have been revoked, and then the general devise would have applied to the property at once; but, so long as those uses subsist, which they clearly do now, there is nothing upon which the general disposition by the will can operate. I do not say that there is no power which the will could exercise, because I think that, if for any reason the uses created by the appointment of June, 1870, should fail, there would be something upon which the will could operate. But it seems to me that, as a matter of fact, there is not anything left for the will to operate upon, so that the exercise of the power by the will is theoretical only, not practical.

This, in my opinion, is the way in which the case would stand

upon principle, and I find that the authorities are to the same effect. In *Pomfret* v. *Perring* (1) the power was a special one, and that gives ground for an argument that that case is distinguishable from the present. But I think that the reasons given by the Lords Justices in that case are not addressed to a special power as distinguished from a general power, and the observations of Lord Justice *Knight Bruce*, and certainly the earlier observations of Lord Justice *Turner*, seem to me to go the whole length required. But, as far as I am concerned, the matter is settled, because not only was that view adopted by Sir *John Romilly* in *Palmer* v. *Newell* (2), though it may be said that his observations amount rather to a *dictum* than to a decision binding upon me, but in the recent case of *Charles* v. *Burke* (3) Mr. Justice *Kay* actually decided the very point, and I cannot distinguish that case from the present. This being so, whatever my own view might have been, I should have felt that I was bound to follow that decision. But I follow it the more readily, when, in my opinion, it is entirely in accordance both with principle and with my own view of the authorities.

Solicitors: *W. W. Gabriel; Ridsdale & Son; Dunster & Chapman.*

(1) 5 D. M. & G. 775. (2) 20 Beav. 32.
(3) 43 Ch. D. 223, n.

W. L. C.

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Feb. 5, 10, 11, 12, 17, 18; *May* 12.

SMITH *v.* ANDREWS.

[1889 S. 4355.]

Several Fishery—Navigable non-tidal River—Public—Prescription—Evidence—Public User—Rate Books.

The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it be navigable.

In an action for trespass on a several fishery evidence of fishing by the public as of right was admitted in derogation of the Plaintiff's title. Entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the lessors, the Plaintiff's predecessors in title.

THIS was the trial of an action in which the Plaintiff *Annie Smith,* widow, claimed against the Defendant *James Andrews,* a fisherman, damages for trespass by fishing in a several fishery described in the statement of claim, an injunction to restrain further trespass by fishing, and a declaration of her title to the fishery in question.

The statement of claim alleged that she was the owner "of a several fishery in the river *Thames* together with all the bucks containing six thoroughs, comprising the whole stream of the said river from the boundary of the fishery belonging to the Corporation of *Maidenhead,* near *Maidenhead Bridge,* leaving the said bridge northward, and extending as far as *Broad Place,* near *Bray Point,* thence comprising the half stream on the *Buckinghamshire* side of the said river from *Broad Place* aforesaid unto and as far as the lower end of *Amerden Ash Eyot,* opposite *Oak Stubbs Hedge,* and of certain eyots situate within the said boundaries," and was also owner in fee of the land abutting on part of the fishery on the *Berkshire* side of the river.

By his statement of defence Defendant admitted that, notwithstanding repeated warnings, he had persisted in fishing in the water in question. He denied the Plaintiff's title. He pleaded that the part of the river in which he had done the acts complained of had been from time immemorial and was a public and

common navigable river, in which every subject of the realm of right had liberty and privilege of fishing. He also pleaded a license from the Conservators of the *Thames*. He also alleged that he had for twenty years, and that the public had for sixty years, caught fish there, and carried them away, without interruption, protest, or complaint. And he set up by way of defence the statute 2 Hen. 6, c. 15.

The part of the river *Thames* including the eyots and several fishery the subject of the action, was formerly part of the Manor of *Bray*, which was a royal manor. It was severed from the manor and passed into private hands by grant of *Charles I.*, dated the 8th of December, 1682. The title of the Crown to the soil of the river and fishery was proved conclusively by public documents, chiefly produced from the Public Record Office, one of the earliest of which was an entry in the Rolls of the King's Court 37 & 38 Hen. 3 (1253): and also by numerous entries in the Court Rolls of the Manor of *Bray*; down to the severance of the same from the manor by *Charles* I.

The title was traced in private hands from a deed enrolled in Chancery dated February, 1748, down to a conveyance in 1882 to Mr. *Tyrrell Lewis*, as trustee for the Plaintiff, by whom the legal estate was conveyed to the Plaintiff herself in 1888.

There was evidence as to angling by the public which satisfied the Judge that to some extent for a considerable period persons had angled both from the bank and from boats and punts without leave from the Plaintiff's predecessors in title or their tenants, and with their knowledge and without their interference, but that there had from time to time been some interference with persons so angling. Since the property had been acquired by the Plaintiff she and her agents had freely given leave to angle, but had done all in their power to prevent angling by the public without leave, and she and her predecessors and their tenants had exclusively exercised the proprietary rights other than angling over the soil of the river and eyots in question by cutting osiers, removing gravel from the bed of the river, renewing eel-bucks, and otherwise: and among other acts proved to have been done on behalf of the Plaintiff in assertion of her right, was a prosecution of Mr. *Layard*, who was also the Defendant in the action

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of *Blount* v. *Layard* (1). The proceedings against Mr. *Layard* are particularly referred to in the judgment.

The Plaintiff's counsel did not object to the evidence of public angling tendered by the Defendant's counsel for the purpose of shewing that the Plaintiff and her predecessors had not had the sole enjoyment of the fishing.

In the course of the evidence for the Plaintiff, it was proposed to put in some old rate books of the parish as evidence of the fact that this property had been rated to the relief of the poor, and of the persons who had been rated in respect of it. The books were brought from the union workhouse where they had been kept.

Henn Collins, Q.C., for the Defendant, objected that the rate books were not admissible to shew who was the particular person in occupation of the property. The entries could only be evidence of reputation, and such evidence was admissible only upon questions of public right.

Willis Bund, for the Plaintiff:—

The entries shew that the property was occupied and rated, and therefore it could not have belonged to the Crown. The books came from the proper custody: *Slater* v. *Hodgson* (2). In that case there was tendered in evidence a bond given to indemnify parish officers against the charge of a bastard. The bond was brought from a chest, kept in a workhouse of the union which comprised the parish, in which chest were kept muniments belonging to the union. It was held that the bond came from the proper depository, and that it was admissible in evidence.

NORTH, J., held that the books came from the proper custody.

Willis Bund:—

The entries in the rate books are admissible in evidence. They are made by parish officers in the performance of their duty, and they shew that the property which was rated was private property, and the public could have no rights over it:

(1) *Post*, p. 681, n. (2) 9 Q. B. 727.

Doe v. *Seaton* (1); *Doe* v. *Arkwright* (2). In *Doe* v. *Seaton* assessments of Commissioners of the land tax, by which it appeared that at a certain time property was assessed in the name of "*Strode*" (the family surname only), were held to be evidence, in connection with other facts, to shew that at that time the property was occupied by a particular individual of the family. In *Blount* v. *Layard* (3) at Nisi Prius Mr. Justice *Field* held such evidence admissible.

(1) 2 A. & E. 171.
(2) 2 A. & E. 182, n.
(3) C. A. May 2, 3, 4, 1888.

BLOUNT *v.* LAYARD.

APPEAL by the Plaintiff against the affirmance by a Divisional Court (*Hawkins* and *Grantham*, JJ.) of the refusal of Lord *Coleridge*, C.J., to enter judgment for the Plaintiff.

By his statement of claim the Plaintiff alleged that he was the owner of the *Mapledurham* estate, in the county of *Oxford*, comprising several manors, and a several and exclusive fishery in the river *Thames*, extending over the whole stream of the river between certain specified limits, and thence extending over the half stream of the river on the *Oxfordshire* side down to another specified point; that the Defendant, on the 14th of November, 1885, fished in the said fishery, and took and carried away fish therefrom to the damage of the Plaintiff. The Plaintiff claimed damages for the trespass, and an injunction to restrain the Defendant from fishing in the future.

By his statement of defence the Defendant alleged that "the Plaintiff was not at the time of the committing of the alleged grievances possessed of the fishery in the statement of claim declared." The Defendant admitted that at the time and place mentioned he fished in the river, and took and carried away fish therefrom by angling from a punt, but not in any other manner.

At the trial before Lord *Coleridge*, C.J., with a jury, the Plaintiff gave evidence of his title to the fishery by documents and the exercise of acts of ownership.

On behalf of the Defendant it was elicited by the cross-examination of the Plaintiff's witnesses that the public generally had for many years past been in the habit of fishing in the main stream of the river with rod and line, with the knowledge of the Plaintiff and his predecessors in title, but without any interruption by them, though they had been prevented from doing so in certain parts of the stream.

LORD COLERIDGE, C.J., held that there was evidence for the jury to consider whether the Plaintiff had proved his title, and refused to direct them to find for the Plaintiff. The jury disagreed, and were discharged by consent. The Plaintiff applied to the Divisional Court to enter judgment for him, and this application was refused.

This decision was affirmed by the Divisional Court.

The Plaintiff appealed.

Jelf, Q.C., *Jeune*, Q.C., and *Stuart Moore*, for the Appellant.

Philbrick, Q.C., and *W. Phipson*, for the Defendant.

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Henn Collins, Q.C., admitted that he could not distinguish the present case.

[NORTH, J.:—I hold that the rate books are admissible as

The following cases were cited: *Neill* v. *Duke of Devonshire* (8 App. Cas. 135); *Bristow* v. *Cormican* (3 App. Cas. 641); *Ryder* v. *Wombwell* (L. R. 3 Ex. 90; 4 Ex. 32); *Goodman* v. *The Mayor of Saltash* (7 App. Cas. 633); *Lord Rivers* v. *Adams* (3 Ex. D. 361).

LORD ESHER, M.R.:—

The Defendant, as one of the public, and in no other capacity whatever, has been fishing in the main stream of the river *Thames* at *Mapledurham*; and he has adduced evidence which shews that, for as long a time as any one can recollect, other people in the same position as himself have fished in the same way at the same place. The Plaintiff claims the exclusive right of fishing in this place, and he has brought this action to establish his right.

The issue raised is not whether the Defendant has a right to fish in the place in question, for he admits that he has none; but he says that the Plaintiff has not proved that he is entitled to interfere with him.

The case being tried before a Judge and a jury, the Judge was of opinion that the evidence had raised a disputed issue of fact which the jury must decide, and he therefore left the question to the jury, whether the Plaintiff had established his title. The jury disagreed, and the result is that, unless something else happens, there must be a new trial.

It is said on behalf of the Plaintiff that the Judge was wrong in holding that there was a dispute of fact to go to the jury, and that no material fact was in dispute. The evidence adduced by the Plaintiff, it is said, was sufficient to maintain his case, and it was really unchallenged by any evidence on the part of the Defendant, and the Judge ought to have directed the jury as a matter of law to find their verdict for the Plaintiff. If there was no evidence upon which any dispute as regards the issue which was being tried could be left to the jury, or if there was no evidence except that which ought not to have been admitted, or if evidence was admitted which could not in the mind of a reasonable man raise any doubt as to the Plaintiff's title, then, in my opinion, it was the duty of the Judge to direct the jury to find for the Plaintiff, and if they disobeyed that direction, their verdict would have been perverse and wrong, and could have been set right by the Court.

It was said that no one asked the Judge to give that direction. All I can say is, that, unless some one misled the Judge into not giving it when he ought to have done so, it is the duty of a Judge, when all the evidence is before him, whether he is asked or not, to accept the responsibility of saying whether there is evidence to go to the jury, and, if there is really no evidence, he does wrong if he allows the case to go to the jury.

And, even if the jury have disagreed upon a question on which the Judge has directed them, yet, if he ought to have directed them in one way, I am strongly inclined to think, though it is not necessary to decide it now, that, the question which he had left to the jury being under those circumstances

evidence who was the owners or occupiers of the property at the time. As to any particular entry some question of its admissibility may arise when it is tendered in evidence.]

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wholly immaterial, the Court, if it thought the Judge was wrong, could enter the verdict as he ought to have ordered it to be entered.

If then we should be of opinion in the present case that there was no evidence proper to be left to the jury, I do not think the Lord Chief Justice was in any way misled. He acted on his own motion and upon his own conviction of what was right, and, if we should come to the conclusion that he ought not to have left any question to the jury, we could now order the verdict to be entered for the Plaintiff, and give judgment accordingly.

Then arises the question, was there any evidence to go to the jury. I agree with the learned Judge that the paper title of the Plaintiff, unless there was something to impugn it, was irresistible, and it shewed that he was the owner of a several fishery in the whole of the river at the place in question. Many pieces of evidence were given to shew the Plaintiff's ownership of the soil of the river. Whether they were so conclusive that that also was not a question for the jury I am not prepared to say, because I think the answer to the question whether he was or was not the owner of the soil is not decisive of the present case. Mr. *Jelf* urged us to say that, if the Plaintiff is the owner of the soil of the bed of the river, the water above it and the fish in the water are necessarily his property, and no one can have a right to interfere with them. I think that is a wholly untenable proposition.

The question, therefore is, whether, the Plaintiff's paper title being as strong as it was shewn to be, there was any evidence to challenge it. The evidence adduced for that purpose is of acts of the Defendant and of many other persons who for many years have done what the Defendant has done. It is true that they were doing that which they had no right to do, and no amount of evidence can shew that their doing it, in the capacity in which they did it, was in the exercise of a right in themselves. They might be so acting by the permission of some other person who had the right, that is, as licensees, but a licensee does not act in respect of a right in himself; he acts by the leave of the person who has the right.

Then it is said, that, the Defendant and the other persons who have acted as he has done being mere trespassers against some one, their evidence is not admissible to challenge the Plaintiff's right. I cannot agree with that view. The question here is, whether the Plaintiff has proved that he can challenge what the Defendant has done, and that depends on whether the Plaintiff has proved that this several fishery belongs to him.

The case is put against the Plaintiff thus: "You have proved that you have a good paper title, but it is settled law that a mere paper title may be shewn to be an ineffective or mistaken title, and although, if you shew a perfect paper title and no one challenges it, or there are no circumstances to challenge it, that paper title will carry the presumption that you have a perfect title, yet, if anyone can shew facts which make it doubtful whether, although you have a perfect paper title, you have the real title,

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Cozens-Hardy, Q.C., *Willis Bund*, and *Stuart Moore* for the Plaintiff:—

The Plaintiff has shewn the existence of the several fishery

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he is entitled to challenge your title." For instance, suppose the Plaintiff proves a perfect paper title, the Defendant may produce another paper title which, if it stood alone, would be a perfect title. In such a case how are you to solve the question who has the real title? You inquire which of them has acted under his paper title unchallenged, and then you say that he who has so acted is to be preferred to the other who had a paper title, but has never acted on it. Here it is said against the Plaintiff, "You have a perfect paper title, if there were nothing to challenge it, but there is evidence that not merely the Defendant has fished in the place in which you allege an exclusive right, but that over a long series of years (as long as anyone can recollect) anybody who liked to do so has fished in the fishery which you say is yours, and which your paper title shews to be yours. They have fished there and you have seen them doing it, not only on one occasion, but whenever they chose to do so, and the jury must be asked to consider whether, as men of business, they think that you and your ancestors would have allowed, not only one person, but hundreds of person to fish in your fishery without any interference, or that you would not have interfered with them." The jury upon that say: "We cannot think that your indulgence is so great, it would not be reasonable; and what is more, we cannot think that you and your father and your grandfather, were all such indulgent people. Everybody is not good tempered, and everybody is not indulgent, and when we find that neither you, nor your father, nor your grandfather interfered, we think there must be some more business-like reason than indulgence for your non-interference." Therefore, the jury may say, "We come to the conclusion that you did not interfere with these people, because, although you had a paper title, you were afraid to act upon it; because you knew, or because you feared, that, notwithstanding your paper title, someone else had a better title."

If the jury should come to that conclusion, it would not be the Plaintiff, but the other supposed person, who could interfere with trespassers.

Against that view there are, of course, immensely strong arguments to put to the jury. It may be said to them: "It is supposed that some other person has this right of fishery, but if so, he must be really as indulgent as it is said that the Plaintiff and his predecessors have been. They talk about this other person with his paper title and his indulgence; but who is he? where are we to find him? If he has this paper title which he knows to be a good one, it is very strange that he should allow all this fishing to go on without interference." Those are no doubt strong arguments, but they are only arguments, and the question is, whether we can say that the Judge ought to have taken the matter into his own hands, and not to have done that which the Lord Chief Justice did—that is, leave the question to the jury, who are judges of the facts, warning them at the same time to be cautious before they went beyond a paper title, so well proved

from the earliest time; her own direct title has been deduced for more than a hundred and forty years. And as we submit not only a documentary title but the actual exercise of the right by

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as the Plaintiff's title was. They should be told all this goes to shew that the Plaintiff has a very strong case; but the question is, whether the Defendant gave such evidence as made it necessary (the Defendant's case being within the bounds of reason) that the question should go to the jury, whether they were satisfied that the Plaintiff's title was an effective one. The question is, whether the Plaintiff has made out that this separate fishery belongs to him, and, in my opinion, that is a question which must go to the jury. In my opinion the evidence tendered by the Defendant was admissible for that purpose, and for that purpose only, and I cannot say that it is so utterly unreasonable that a jury should find for the Defendant that we ought to enter the verdict for the Plaintiff. Whether, if the jury had come to a conclusion in favour of the Defendant, their verdict could be set aside as against the weight of evidence, is a matter which, as it seems to me, is not ripe for us to consider yet.

But I must deal with the authorities which are said to be contrary to the view which I have expressed. The first is *Neill* v. *Duke of Devonshire* (8 App. Cas. 135), in the House of Lords, and I think it is impossible to regard it as an authority contrary to what I have said. And, indeed, when I read the opinions of the learned lords, I think there are to be found in them expressions which are in favour of this question being put to the jury. In that case the question arose with regard to a claim of a several fishery in a navigable tidal river, in which, therefore, *primâ facie* the public had a right to fish, and the judge who tried the action told the jury that that was so, but he said that the plaintiff might rebut the *primâ facie* right of the public, by shewing that a separate fishery had been granted to him in that tidal water, but it must have been granted before Magna Charta. Therefore, *primâ facie*, the defendants having a right to fish, the burden was thrown upon the plaintiff to shew that he had a separate fishery so granted. Under these circumstances the plaintiff shewed (as the present Plaintiff has done) a paper title, which the judges and the lords all said, if it stood unchallenged (the burden being upon him) was so strong that it would prove he had a separate fishery. But then they said, there had been acts as to which it must be considered whether they did not throw so much doubt upon the Plaintiff's perfect paper title as to render it necessary that the jury should be asked whether, in their opinion, the paper title produced by the Plaintiff was a real title to the several fishery.

Lord *Selborne* said (8 App. Cas. at p. 143): "These written titles (if the possession and enjoyment has been consistent with them) afford irresistible ground for a presumption that the fishery, either in all the tidal waters of the river *Blackwater*, or, at all events in that part of them which is now immediately in question, was put 'in defence' before *Magna Charta*; and having become vested in the Crown by forfeiture of the private rights from time to time acquired in it, was well and effectually

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herself and her immediate predecessors by themselves or their tenants has been abundantly proved.

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granted to the predecessor in title of the Duke of *Devonshire*. . . . Under the circumstances which I have stated, the real controversy in this case is as to the sufficiency of the evidence of possession and enjoyment, without which even the clearest apparent title to a several fishery, on paper only, would not exclude the public right." It was admitted that the public right existed, unless the Duke could shew that he had the several fishery. The acts relied upon to challenge the irresistible paper title of the Duke were acts done by what was called "cot-fishing." If the Duke's title was really irresistible, this "cot-fishing" in his several fishery was a trespass. Then, Lord *Selborne* said (8 App. Cas. at p. 153): "Nothing now remains for me but to deal with the last question, on which your Lordships heard the Respondent's counsel, viz., whether Mr. Justice *Lawson's* manner of leaving the evidence as to cot-fishing to the jury was right, and what was the proper effect of that evidence; and, shortly stated, he said that the Appellants' evidence as to cot-fishing was, that it had been carried on, upon all parts of the river . . . during the present century, with the knowledge of the Duke or his agents, and without interruption by them, as far back as living memory extends."

That evidence seems to me to be exactly equivalent to the evidence in the present case with regard to the acts of fishing done with the knowledge of the Plaintiff, or his agents, and without interruption by them as far back as living memory extends. Then Lord *Selborne* adds (8 App. Cas. at p. 154): "This evidence is relied upon to shew, not (as in the case lately before your Lordships of *Goodman* v. *Mayor and Burgesses of Saltash* (7 App. Cas. 633), that this practice of cot-fishing is reconcilable with the existence of a several fishery in that part of the river; but for the opposite purpose, of establishing a general public right of fishing, and proving that, notwithstanding all the evidence of title and possession, adduced by the Duke, the river *Blackwater* was not 'put in defence' before *Magna Charta*. The mode of fishing, by drift nets, practised by the Appellants, is of recent introduction, and is wholly different from cot-fishing, and beyond comparison, more destructive to the fish and more injurious to the owner of the several fishery, if a several fishery exists. Mr. Justice *Lawson* was, in my opinion, quite right in telling the jury, as he did, that the Duke's case, taken by itself, was one of such strength as almost (if not absolutely) to entitle his Grace to have a verdict entered for him, but for the Appellants' evidence as to cot-fishing; and also that, if the jury once came to the conclusion that the Duke, under the grants to his ancestors, had a several fishery in the river, the question of cot-fishing would become immaterial." Mr. Justice *Lawson* left it to the jury to say, whether, taking the paper title together with the cot-fishing (which not merely took place, but took place with the knowledge of the Duke and his agents, and without interruption), they were convinced that the Duke, notwithstanding the perfection of his paper title, was really the owner of the several fishery. Looking at the burden of proof in that case, and the only question left to the jury (for the question of the

Admitting, for argument sake, that the Defendant has established, in fact, that the public did from time to time, under

right of the public could not be left to the jury), viz., the question whether the Duke had made out his title, it seems to me that the Duke was put in precisely the same position as the present Plaintiff. The present Plaintiff has proved a perfect paper title, but for the acts done by other persons in the river, and done in the presence of the Plaintiff and his ancestors. Does that produce a doubt in the minds of the jury, not whether some one has the several fishery, but whether the Plaintiff is entitled to it? I think what Lord *Blackburn* said was to the same effect. He said (8 App. Cas. 190): "There remains the important question, whether there should be a new trial, on the ground that the Judge did not properly leave to the jury the evidence of modern user, both that which was in favour of the prescriptive origin of an exclusive fishery, and that, more especially of cot-fishing, which had a tendency to prove that there never was an exclusive right of fishery, so that as he left it to the jury the verdict was not satisfactory." In my opinion, Lord *Blackburn* answered that question, which he thus puts to himself, in the affirmative, viz., that Mr. Justice *Lawson* was right in leaving to the jury, not the question whether what the cot-fishers did was done in right of the public, but whether the fact of their doing it in the presence of the Duke and his agents, without interruption by them, did not lead the jury to the conclusion that, although the Duke had a paper title, yet, in truth, he had not the real title to a several fishery.

I think that is the question which, upon the evidence given in the present case, the learned Judge was bound to leave to the jury, not for the purpose of shewing that the Defendant had any right of fishing, but for the purpose of shewing that, although the Plaintiff had a good paper title, yet it was only a paper title, and that, looking at what he and his ancestors had done or omitted to do, the jury might well doubt whether there was not someone else who really had this several fishery, and whether, therefore, the Plaintiff had proved his right to it. If the Plaintiff had no title, then, whatever trespasses the Defendant, and other persons like him, had committed, the Plaintiff could not challenge them.

I think there was a question to go to the jury; and, therefore, a new trial will follow by reason of the failure of that tribunal to decide the question. We have only to dismiss the appeal; and, in my opinion, it should be dismissed with costs.

LINDLEY, L.J.:—

The action is brought by the Plaintiff for a trespass on his fishery. He alleges, and the Defendant denies, that the place in question is within the limits or is part of the Plaintiff's fishery. The Defendant was entitled to have that question tried by a jury, and he insisted upon his right to have it so tried. It has been tried, and the jury could not agree. Notwithstanding this the Plaintiff now says that the law is so plain that there is no question to go to the jury, and that he is entitled to judgment on the materials as they stand.

That is a bold contention, and I am not prepared to go so far. I need not say what I should do if I had to try the case without a jury and to decide

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colour of right, fish in the water, no such right can exist in law. The public can have no legal right to fish in a non-tidal

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the question in controversy myself. Probably I should be able to come to a conclusion without any great difficulty. But what we have now to see is, whether the case is so clear that it was improper that the jury should deal with it at all.

Now the Defendant says that from time out of mind the public have enjoyed the sport of angling in the *Thames* at the place in question. No doubt they have in fact, and that has to be explained and accounted for. Is that a matter for the jury, or is it necessarily a matter for the Court? What is the inference to be drawn from that use and enjoyment of the public from time out of mind? According to the Plaintiff, the only possible inference is that this had been done with the tacit submission of himself and his predecessors in title. According to the Defendant, there is another possible explanation, viz., that this fishing has been allowed to go on by the Plaintiff and his predecessors because they were conscious of some infirmity in their title.

Those are the alternatives suggested, and for aught I know there may be others. If the case goes to a new trial the Plaintiff may be able to adduce further evidence. I do not know whether he will, but can we say that we ought now to enter judgment for the Plaintiff? I do not think we can, and that is sufficient for the present purpose. I think the appeal should be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The question is, not what we should do if we were called upon to discharge the functions of a jury. I do not desire to be understood (any more than the Lord Chief Justice did) as entertaining any doubt as to what the reasonable verdict of a jury ought to be on these facts; but the jury are intrusted by the law with the decision of this point, and if there is any evidence to go to a jury—if there is anything which in the view of a reasonable man might shake their belief in the proof which the Plaintiff has adduced of his title—the Defendant is entitled to have his case disposed of by the tribunal of his country, and a judge has no authority or power to direct an inference to be drawn as a matter of law when it is really a disputable inference of fact.

The Plaintiff's case is a very strong one. He is the owner of the *Mapledurham* estate on the banks of the *Thames*, and he has unquestionably exclusive rights of fishing to some extent in the waters outside. He has proved without any contradiction that, in the pools and other parts of the river outside, he has not only fished himself, but has prevented other persons from fishing. He has proved that he is the owner of *Mapledurham*, and he has given some evidence that the boundaries of the manor extend to the opposite bank of the *Thames*, and he has given some evidence (of course it will be for the jury to say whether the witnesses were trustworthy persons) of the cutting of osiers, reeds, and other growths upon the bank and on the bed of the river, which would lead in law to the inference that the bed of the river was the Plaintiff's, or at all events so much of it as could be reasonably connected with the particular acts of cutting proved.

But, on the other hand, the question

river. It could only be claimed on the presumption of a lost grant to the public, or, in other words, by prescription. In the

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was, not whether the Plaintiff was entitled to the fishing in the pools, but whether he was entitled to an exclusive right of fishing in the main body of the stream. It must, not, however, be forgotten that the pools themselves often extend across the whole of the main stream, and when I use the term "main stream," I mean the stream exclusive of the pools.

Now, with regard to the main stream, the Plaintiff did not shew any acts of fishing which were exclusive of the general public. Everybody who liked fished there, and it is well known that all the way down the *Thames* such fishing is habitual. What is the law applicable to a title of that sort? All the presumptions seem to me to be in favour of the Plaintiff. The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river. There is also a presumption that the owner of the bed of the river has the right to fish in the stream, and to prevent other persons from fishing there. But these are presumptions of fact, which may be rebutted. They are not rules of law which must apply to every case, because the other facts of a particular case may shew that in that instance the presumption does not obtain. For example, it may be that in a particular place the bed of the river does not belong to the owner of the land which goes down to the bank. Or again, it may be that in a particular place a man may own the bed of the river itself, and yet someone else may have the right to fish, and to exclude others from fishing there. So that, in each case, applying the presumptions so as to throw the onus of proof on the right person, when you have got the whole of the evidence you must make up your mind how far the *primâ facie* presumptions have been rebutted, and what is the real truth of the case apart from all technicality. It may also well be, that one person may have the right to fish in particular portions of a river; and another person may have the right to fish in other portions of the same stream. We are dealing with the *Thames*, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river, that is, all the Queen's subjects have the right of passing and re-passing on it, and it is what is called in the old books a "king's stream," by which is meant, not that the soil must belong to the king, but that it is a highway, and that the king is the natural guardian and conservator of the commodious and convenient passage of the river by his subjects. It is a question of fact, not of law, in whom the bed of the river *Thames* in any particular place is vested. It may be that in one place the bed belongs to the king, and that in another place it belongs to a subject. In each particular part of the river it is a question of fact, to whom the soil belongs.

There is another most important matter to be recollected as regards such streams as the *Thames*, viz., that, although the public have been in the habit, as long as we can recollect, and as long as our fathers can recollect, of fishing in the *Thames*, the public have no right to fish there—I mean they have no right as members of the public

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first place there can be no prescription for a *profit à prendre*, in the second place the public cannot prescribe: *Hargreaves* v. to fish there. That is certain law. Of course, they may fish by the licence of the lord or the owner of a particular part of the bed of the river, or they may fish by the indulgence, or owing to the carelessness or good nature, of the person who is entitled to the soil, but right to fish themselves as the public they have none, and whenever the case is tried the jury ought to be told this by the judge in the most emphatic way, so as to prevent them from doing injustice under the idea that they are establishing a public right. There is no such right in law, and it has not been contended that there is.

But, on the other hand, what is the Plaintiff's legal position? He has to prove that he is entitled to the bed of the river or to the right of fishing, and excluding others from fishing at this particular spot. The *onus* rests upon him. Now, as I have said, he made a very strong case indeed; he shewed a perfect paper title as regards the pools of the river, and adduced conclusive undisputed evidence of enjoyment. As regards the main stream, however, there was this gap in the Plaintiff's case. He could not and he did not attempt to shew, that he, or his predecessors, or any of the tenants to whom he or his predecessors had let the fishery, had stopped, or endeavoured to stop, any one from fishing in the main stream. Now, if the Defendant had attempted to set up uninterrupted fishing by the public in the main stream as evidence of a right in the public to fish, the attempt ought certainly to fail. No judge ought to have allowed such evidence to be given, because you cannot set up by evidence a right which does not exist in law. But that is not the way in which the learned counsel for the defence sought to utilize this gap in the Plaintiff's case. He asked the jury to believe that, unless there was some defect in the Plaintiff's title, notwithstanding all his documents, notwithstanding the evidence of enjoyment which had been given, notwithstanding the proof of the perambulation, notwithstanding the undoubted ownership of the pools, that, unless there was some defect in the Plaintiff's title as regards the main stream, he and his predecessors would at some time or other have been found interfering with those acts which could not be justified as against the true owner of the fishery. The true owner must be somewhere, and, whoever he is, whether he be the Plaintiff, or a third person, or the king, he has unquestionably a right to interfere with the people who fish in this part of the *Thames*. But, says the Defendant's counsel, the fact, that you, who live on the bank of the stream, have looked on from time immemorial and from your windows watched the public fishing, must be taken into consideration, and it may well make the jury doubt whether you are the true owner, in spite of the apparent strength of your title.

Can we exclude that fact from the consideration of the jury? Can we say that that argument ought not to be addressed to them? I am far from saying or from thinking that this argument ought to prevail, but it seems to me that it is a question for the jury, and not for the judge. I think that, if the case is retried, the jury ought to be most carefully warned (as they were) not to do injustice under the idea that they are vindicating a public

Diddams (1); *Pearce* v. *Scotcher* (2); *Hudson* v. *MacRae* (3); *Neill* v. *Duke of Devonshire* (4); *Lord Rivers* v. *Adams* (5).

A right to use a road or river as a highway does not justify the use of it for sporting purposes, fishing or pursuit of game being a trespass: *Reg.* v. *Pratt* (6). None of the Acts relating to the *Thames* Conservancy confer any rights not previously existing.

The statute 2 Hen. 6, c. 15, is expressly repealed by the *Statute Revision Act*, 1863, the qualifications of sect. 1 not being applicable.

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right. I think they ought to be solemnly told (as they no doubt will be) that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of *Isaac Walton* from dropping their lines for trout, for fear that their doing so should crystallise into a right. It would be a most unfortunate thing for the public if that should ever happen, and I think that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence. But, when the judge has told the jury that and warned them accordingly, it seems to me that it is still for the jury to decide whether this indulgence, this long non-interruption of fishing opposite the Plaintiff's windows, throws such doubt upon his title as might relieve them from finding a verdict in his favour.

The action was tried by a special jury before Mr. Justice *Field*, and a verdict was given for the Plaintiff on the 28th of March. In the course of his charge to the jury Mr. Justice *Field*, referring to receipts for rents and assessments for church and poor rates in evidence, said:—"Then again, we have receipts for rents and assessments. These are very important for this reason. The assessments of property are made by public officers. The Overseers know all about it. They know who are the owners and occupiers. It is their duty to inquire. In those days voting did not depend upon it as it does now. But it was their duty to inquire, and therefore it is a strong thing to find for a very long period assessments, in every one of which the person assessed was the tenant of Sir *Charles Blount* or the *Blount* family."

Solicitors: *Blount, Lynch, & Petre*, for *Mullings, Ellett & Co., Cirencester; Hillearys & Layard.*

W. L. C.

(1) Law Rep. 10 Q. B. 582, 585.
(2) 9 Q. B. D. 162.
(3) 4 B. & S. 585.
(4) 8 App. Cas. 135.
(5) 3 Ex. D. 361.
(6) 4 E. & B. 860.

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Henn Collins, Q.C., and *Edward Abinger*, for the Defendant:—

The Defendant does not rely on the statute 2 Hen. 6, c. 15. We admit that the Plaintiff has established a documentary title to her fishery. But she has failed to prove the enjoyment of the sole right of angling. At the lowest the fact that her immediate predecessors have not dared to enforce their alleged right shews the defect of their title.

In the case of a navigable river the right of fishing is *primâ facie* in the public as subjects of the Crown: *Woolrych* on Waters (1).

It is true that the public cannot as such prescribe; but where, as in the present case, some privilege has been exercised by the public for a number of years the Court will, if it can, presume a legal origin and mode of enjoyment. The Court will presume that something was done in the nature of abandonment, or analogous to the dedication of a highway, or that some grant was made to trustees for the public (if necessary during the period that there is a gap in the title): *Rogers* v. *Allen* (2); *Woolrych* on Waters (3); *Goodman* v. *Mayor of Saltash* (4); *Mayor of Carlisle* v. *Graham* (5). *Neill* v. *Duke of Devonshire* (6), is not inconsistent with this principle. So far as the line of authorities, of which *Pearce* v. *Scotcher* (7) is one, is inconsistent, they ought to be overruled.

The effect of the *Thames Conservancy Acts* is to give the public a right of recreation including angling from boats.

Cozens-Hardy, in reply:—

The presumption of a public right to fish in navigable rivers is confined to tidal waters as was established in respect of one part of the *Thames* a little higher up in *Blount* v. *Layard* (8).

May 12. NORTH, J. (after stating the pleading, continued):—

The Plaintiff's title having been thus challenged, she has thought it necessary or desirable to prove it from the earliest

(1) Ed. 1830, pp. 76, 85.
(2) 1 Camp. 309.
(3) Ed. 1830, p. 291.
(4) 7 App. Cas. 633.
(5) Law Rep. 4 Ex. 361.
(6) 8 App. Cas. 135.
(7) 9 Q. B. D. 162.
(8) *Ante*, p. 681, n.

times. I do not quite understand why this course had been adopted. It would certainly have been necessary if that portion of the *Thames* now in question had been affected by the ebb and flow of the tide, as well as being navigable, for then the bed or soil of the river would have been in the Crown, and the right of fishing in the public, unless the Plaintiff could have made out a valid title to the fishery based upon some grant by the Crown antecedent to Magna Charta. But it is not suggested in this action that the *Thames*, in which we know that in Lord *Hale's* time, long before *Teddington Lock* was built, the tide was not felt above *Kingston*, was ever tidal at the part now in question. But the Plaintiff's title to this fishery and the bed and soil of the river having been challenged, she has gone into it for 700 years past, and has, in my opinion, met the challenge most effectually. I do not intend to go through the evidence with much detail, but some reference to the title established is desirable.

[His Lordship recapitulated the documentary evidence of the Plaintiff's title down to the alienation of the fishery by *Charles* I., and continued as follows:—]

All these documents shew that during the centuries over which they extend the right of the Lord of the Manor of *Bray* to the bed of the *Thames* and the fishing therein was clearly established, and was most carefully and zealously maintained, guarded, and enforced against all persons. The most strict preserver of the present day could not have done more to protect his rights, and prevent encroachments thereon, than documents still extant shew was done systematically during the hundreds of years through which the title is traced down to the time of *Charles* I.: and Mr. *Henn Collins*, the Defendant's counsel, admitted that for this period the Plaintiff had made out an overwhelming title to what she now claims, which no one could dispute.

[His Lordship then referred to the alienation of the river and fishery by *Charles* I., and traced the subsequent title from the year 1748 down to the Plaintiff, and continued:—]

So far therefore as a title on paper goes the Plaintiff's title is wonderfully clear. It is traced consecutively for upwards of 700 years except during the interval between 1632 and 1748, and there are probably not many owners of property in *England*

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who could shew such a title. But a mere paper title can be challenged and displaced; and it is necessary to consider how far the possession has been in accordance with this title, at any rate during recent times, as to which corroborative evidence may reasonably be expected to be forthcoming.

It appears from the title-deeds, as I have mentioned, that the fishery was from time to time described as in the occupation of various persons whose names are given. The poor-rate books of the parish of *Bray* from the year 1744 (the earliest in existence) to the year 1870 (except those from 1782 to 1797, which are missing) were produced before me. Their admissibility was at first objected to; but upon the case of *Doe* v. *Arkwright* (1) being referred to Mr. *Henn Collins* withdrew his objection. They clearly are evidence, as being entries made by public officers in discharge of a duty, their duty being to ascertain who is the occupier of the property, and to enter his name as the person rateable in respect of it: and so also Mr. Justice *Field* held in *Blount* v. *Layard* (2). The entries in the rate-books, from first to last, correspond precisely with and confirm the statements as to the occupation of the property found in the title-deeds. And these rate-books are important evidence also in another way. In all the earlier books, down to 1782, the entry is merely the name of the person rated, and that it is "for water"—*e.g.*, the entry in September, 1748, runs thus:—"*Richard Round*, for water, 3*s.* 6*d.*" But under the statute of *Elizabeth*, and, indeed, until very recently, mere water—*i.e.*, a mere incorporeal fishery unconnected with the ownership of the soil—was not rateable at all. A man could only be rated to the poor-rate if he was an occupier of land. In *Rex* v. *Ellis* (3), a man was held rateable in respect of a fishery because a stake to which his nets were fastened was fixed in the bed of the river, and this was held to be sufficient evidence of his right to the soil, and consequent liability to be rated. Here there is much more. In 1748 *Richard Round* could only be rated because he was the occupier of the land covered with water —*i.e.*, because the soil of the river was let to him—and the granting of leases relating to the soil is the exercise of acts of

(1) 2 A. & E. 182, n. (2) *Ante*, p. 681, n.
(3) 1 M. & S. 652.

ownership as to such soil. From the year 1797 the rate-books are somewhat different in form; the person rated is named as "occupier;" the rating is described as a "fishery and eyots;" and the rent and rate are given. From the year 1846 the name of the owner also is added, the entry in that year describing *Simon Wilder* as occupier and *Sarah Payn* as owner. As far back as living memory goes, the payment of these rates by the occupier is duly proved.

[His Lordship stated a number of acts of ownership in respect of the fishery and the soil of the river proved to his satisfaction to have been exercised by the Plaintiff, her predecessors in title and their tenants, including numerous leases thereof, and receipts of rent thereunder; and among others the leasing by one *Simon Wilder*, and afterwards by *Jonathan Bond* (tenants of the owner of the fishery) to a club called the *Thames Trout Club* of the right to angle in that part of the *Thames*. He considered the statutes relating to the Conservation of the *Thames*, relied on on the part of the Defendant, including the *Thames Preservation Act*, 1885, and decided that the licence of the *Thames Conservancy* did not purport to confer upon the Defendant any right or title to fish in the *Thames*: and that, even if it had done so, it would be wholly inoperative and void against the Plaintiff under the *Conservancy Acts* of 1864 (s. 67), 1866, and 1885. His Lordship then continued:—]

Before passing away from these Acts I must remark that there is not anything in them from beginning to end recognizing any right of fishing by the public. If this were intended it is inconceivable that it should not have been expressed in the Act of 1885, especially when one bears in mind the full inquiry which had taken place before a Select Committee immediately before the passing of that Act. On the other hand, the existence of rights of private owners is expressly recognized. The right of free navigation is declared and secured, but before and ever since the time of Lord *Hale* the co-existence of the right of a private owner to the bed of a non-tidal river and the fishery therein with the right of the public to use it for navigation have been recognized and well established.

The idea is sometimes entertained that the right to pass along

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a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it. Some few passages may be found in the books in which Judges are reported to have said that subjects have a right to fish in navigable rivers, just as in the sea; but on investigation it always will be found that they are referring to navigable rivers where the tide ebbs and flows, and nothing else.

The case of *Murphy* v. *Ryan* (1), in the Common Pleas in *Ireland*, in the year 1868, was an action of trespass for breaking and entering the plaintiff's close covered with water called the river *Barrow*, and catching and taking away the plaintiff's fish there; the part of the river where these acts were done being above the influence of the tide. The defendant's pleading alleged that the river was a public navigable river, in which every subject of the realm had exercised and enjoyed of right the liberty and privilege of fishing from time immemorial. These facts were all admitted by a demurrer to the plea, put in on the ground that no such right as alleged could belong to or be acquired by the public in an inland river beyond the point where the tide ceased to ebb and flow.

The demurrer was allowed, and the plaintiff's legal right was thereby established. Most of the authorities on the subject will be found in the exhaustive judgment of the Court delivered by Lord *O'Hagan*. At page 152 he says: "Upon a full consideration of all the cases, it will, I think, appear that no river has been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *primâ facie* in the riparian owners, and the right of fishing private." And a little further on he says: "In *Malcolmson* v. *O'Dea* (2), Mr. Justice *Willes*, delivering the opinion of the Judges, said: 'The soil of all navigable rivers like the *Shannon*, so far as the tide flows and

(1) I. R. 2 C. L. 143. (2) 10 H. L. C. 618.

reflows, is *primâ facie* in the Crown, and the right of fishing *primâ facie* in the public.' This broadly states the principle on which our judgment proceeds, at once giving the true legal qualification to the word 'navigable,' and defining and limiting the rights of the Crown and the public." Although that decision of a Court in *Ireland* is not, the authorities upon which it is founded are binding upon me. Again, in *Orr-Ewing* v. *Colquhoun* (1), Lord *Hatherley*, speaking of the *Leven*, a navigable but non-tidal river flowing from *Loch Lomond* to the *Clyde*, says: (2) "There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way." Lord *Blackburn* (3) makes remarks to the same effect; and Lord *Gordon* says: (4) "Where such a river is navigable, free and open to the public, the right which the public has in such a river is substantially a mere right to use the river for the purposes of navigation similar to the right the public may have to passage along a public road or footpath through a private estate." The recent unreported case of *Blount* v. *Layard* (5), in the Court of Appeal, is also precisely in point, and indistinguishable from the present case. To prevent misconception I would add that, when the bed or soil is said to belong to the riparian owner, the reference is to the origin of the title only. The right to the bed of the stream is not inseparably bound up for ever with the right to the bank. An owner of both may retain one and part with the other, as in the present case—the bed of and fishery in the river having become a separate property, to which the title is separately traced.

The junior counsel for the Defendant, Mr. *Abinger*, suggested that the use of the word "recreation" in the Act of 1885 might confer a right to fish: but I do not think so. The object of the Act was to preserve existing rights, not to create new ones or destroy old ones; and the right to navigate for recreation would no more confer a right to fish than a right to enter on land to erect booths for a fair, or for horse-races, or for pastime and

(1) 2 App. Cas. 839.
(2) Ibid. 846.
(3) 2 App. Cas. 854.
(4) Ibid. 868.
(5) *Ante*, 681, n.

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recreation (all rights recognised by law), would authorize milking the cattle, or clipping the sheep, or appropriating the game or rabbits found thereon.

It may be said also that the provisions for the preservation of fish, and against netting, would be of no benefit to the public unless they had a right to fish. But there are large portions of the *Thames* in which the public are at liberty to fish without interference: not from any right of their own, but because the real proprietors of the soil and fishery are not in a position to trace and establish, or do not care to assert, their title; or, as in the case of the Plaintiff, do not desire to exclude the public. This is quite sufficient to account for these provisions, without holding that they were intended to take away vested rights of property in the owners of fisheries; which is clearly not within the scope or intent of these Acts.

I must now refer to what is made by the Defendant the leading feature in his case—viz., the mode in and extent to which the Defendant and others have in fact fished the waters in question. There is a considerable body of evidence that for forty or fifty years past all persons who thought fit have fished without let or hindrance, and without being interfered with by any person, without leave or licence, and as what they call a matter of right. It has been proved, also, that this has been done very frequently in the presence or with the knowledge of the owners or occupiers of the fishery. The evidence is, however, not all one way; there is evidence, which I believe, that on some occasions and from time to time persons have been interfered with and ordered off; and the Defendant's leading counsel felt the weight of this, for though the Defendant's own evidence is that he has fished in the river from the bank and from boat all his life, his counsel carefully and advisedly limits his claim to a right to fish from boat or punt only. And the evidence is quite clear that, ever since the Plaintiff acquired the fishing, she has done all that she could possibly do to assert and protect her rights.

So early as 1882, she, through her trustee. Mr. *Lewis*, prosecuted Mr. *Layard*, who put himself forward as the champion of the fishing rights of the public, and fished in the Plaintiff's water. When the case came before the magistrates, Mr. *Layard*

challenged Mr. *Lewis's* title, and also alleged that he and the public had a right to angle; and said that on this ground the jurisdiction of the magistrates was ousted. The latter point the magistrates did not decide; but they came to the unfortunate conclusion that Mr. *Lewis* had not established his title to the soil or bed of the river, and therefore could not claim the exclusive right of angling. The result was that the summons was dismissed, though the Plaintiff had the barren success of establishing before a Divisional Court that the magistrates might upon the facts stated have convicted Mr. *Layard*; or, in other words, that a claim by a member of the public as such to angle in the Plaintiff's water was impossible in law, and therefore, even if made *bonâ fide*, did not oust the magistrates' jurisdiction. This is well-settled law: see *Hargreaves* v. *Diddams* (1); *Pearce* v. *Scotcher* (2), both dealing with and treating as impossible in law this claim of a right to angle as one of the public. Mrs. *Smith's* solicitor also sent a circular to all the professional fishermen in that part of the river warning them not to fish without his leave —a notice which had the effect of deterring some, though not others. Her solicitor has also in and since 1882, on her behalf, given written and verbal notice to other persons not to trespass on her fishery; and she has, in my opinion, done all that was reasonably incumbent upon her, and, indeed, all she could, to assert and maintain her title. She and her agents have also from time to time given leave to fish to very numerous persons who applied for it, and it is only fair to her to say that she has always expressed her willingness to permit fishing in her water so long as it is done by her leave, and not in express defiance of her rights. But even if the public had in fact fished this water with less interference or interruption than was actually the case, it would not supply any defence to the Defendant in the present action. Any acquisition of right arising from long-continued user must be founded upon either custom, prescription, or lost grant. It is well settled that the public cannot have any right to fish founded upon custom, however long the practice has continued. Upon this point it is not necessary to refer to various well-known and often cited authorities. I will only mention two

(1) Law Rep. 10 Q. B. 582. (2) 9 Q. B. D. 162.

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which are not so frequently referred to—viz., the judgment of Lord *O'Hagan* upon this point in the case of *Murphy* v. *Ryan* (1), already mentioned, and the judgment of *Byles*, J., in *Attorney-General* v. *Mathias* (2); and the words of *Lawson*, J., adopted by Lord *Selborne* in *Neill* v. *Duke of Devonshire* (3), that "No exercise of cot-fishing in the river, if it was really the several fishery of the Duke, could take away the several fishery from him, or confer any rights on the public." Then, can any such right be acquired by prescription? It is clear settled law that it cannot; but it is unnecessary to follow this point further, because the learned counsel for the Defendant (Mr. *Henn Collins*) admitted that it was not possible to contend successfully that such a right could be so acquired. Lastly, as to any presumption of a lost grant, the observations of *Byles*, J., in *Attorney-General* v. *Mathias*, are conclusive. There can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription. Prescription pre-supposes a grant, and if you cannot presume a grant before legal memory, *à fortiori* you cannot presume a grant since. Before leaving this subject I desire to refer to the summing up of the law by Lord *Cairns* in *Goodman* v. *Mayor of Saltash* (4), where he says: "I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit *à prendre in alieno solo*. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a profit *à prendre in alieno solo*, and indeed cannot be the grantee either of a several fishery or of any other kind of real property."

But the Defendant's counsel endeavoured to turn the flank of the Plaintiff's position in another way. It may be true to say—this I understand to be his argument—that the public have not acquired a right in themselves to fish; but it is a sufficient answer to this action to say that the Plaintiff has not any right to interfere with the Defendant in fishing, for the original title of the Plaintiff's predecessors to the fishery has been displaced

(1) I. R. 2 C. L. 155.
(2) 4 K. & J. 579.
(3) 8 App. Cas. 154.
(4) 7 App. Cas. 648.

by some abandonment or dedication to the public, or some conveyance to a trustee for the public, during the interval of time between 1632 and 1748, in which the devolution of the Plaintiff's title is not traced, of a right to fish in this part of the river, and for this purpose the learned counsel for the Defendant treats abandonment and dedication as identical; and he says that, as a matter of principle, a Court is bound to find, if it is reasonably possible, some legal origin to support an enjoyment continued through a long series of years—some legal justification for acts of open user committed from time out of mind which, unless they can be justified, were acts of trespass—and he relies upon the case of *Goodman* v. *Mayor of Saltash* (1). Having regard to the title proved by the Plaintiff, the burden of making out this case rests upon the Defendant. And the first difficulty in his way is that such a defence is not one of general application, but relates specially to this particular part of the river only, and ought to have been raised by the pleadings. They are wholly silent upon this point. I should not, however, have allowed the Defendant to lose a good case merely from any technical defect in the pleadings, but should have made any necessary amendments; but there are more serious difficulties behind. One of them is the existence of the decisions to which I have referred, shewing that such a right as it is suggested was abandoned, dedicated, or conveyed, for the use of the public cannot exist in law—confirmed by the recent cases of *Blount* v. *Layard* (2), in the Court of Appeal, and *Neill* v. *Duke of Devonshire* (3), in the House of Lords. The only answer given by the Defendant's counsel is to submit that those cases were wrongly decided, because the important principle of law to which I have referred above was lost sight of in them. I cannot accede to any such argument. Those decisions would be binding upon me in any case, even if it were possible to believe that all the judges had overlooked that well-known principle. Nor is the supposition correct in fact, for the point was expressly raised in the House of Lords (4), and the decision of *Blount* v. *Layard* is of still later date. Having regard to these decisions, I am unable to find or presume

(1) 7 App. Cas. 633.
(2) *Ante*, p. 681, n.
(3) 8 App. Cas. 135.
(4) Ibid. at p. 137.

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any legal origin to which such enjoyment of the fishing as the public have had in the present case can be referred; and I cannot find anything in the case of *Goodman* v. *Mayor of Saltash* (1) which in any way assists the Defendant; on the contrary, the observations of all the law lords seem to me unfavourable to him. There is this further difficulty in the Defendant's way also—that the evidence is wholly insufficient, in my opinion, to warrant the conclusion or inference that there ever was, in fact, any such abandonment, dedication, or conveyance, as suggested, even if it could have had any legal validity. Although, no doubt, the public have long fished in this part of the *Thames*, and to a great extent without interruption, it is only apparently in recent years, since the population has greatly increased and facilities for travelling have been largely developed, that the claim to do so as of right has been set up, at any rate to any considerable extent. It is not until such a claim is openly asserted and adversely exercised that any real difficulty arises. Until then any owner of land or fishing may well be content to allow others to use his property in a way which gives enjoyment to them without harming him, or even at some personal sacrifice to himself. Every county, every district, furnishes numerous instances in which privileges are permitted to the public which could not be claimed and would not be tolerated for one moment as of right. It would be very unfair and unjust to a proprietor that any unfavourable inference should be drawn from such concessions, or that they should be used against him as evidence of an adverse right; and I will add that it is very much against the interest of the public that attempts so to use them should be made, as the result necessarily is to check the giving or continuance of facilities for public enjoyment liable to be thus misconstrued and abused.

I adopt entirely the language of Lord Justice *Bowen* in *Blount* v. *Layard*, where he says (2): "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many

(1) 7 App. Cas. 633. (2) *Ante*, p. 691, n.

persons besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of *Isaac Walton* from dropping their lines for fish, for fear that their doing so should crystallise into a right. It would be a most unfortunate thing for the public if that should ever happen."

Upon this point I also desire to refer to the observations of Lord *Selborne* and Lord *O'Hagan* in the House of Lords in the case of *Neill* v. *Duke of Devonshire* (1), upon the question what weight should be attributed to the usage of fishing from cots from time immemorial—a usage identical with that of fishing from boats or punts relied upon in the present case.

Lord *Selborne* says (2): "Usage, continued during living memory, when there is nothing to the contrary, and when the question is one of prescription, may (no doubt) justify the presumption of a similar usage, as of right, from time immemorial. But when it is relied upon not to establish a prescriptive right, but to displace a prescriptive right, supported by written titles and evidence of long possession for a period earlier than, and coming down to, the time of living memory, it appears to me that such a presumption would be neither reasonable in fact, nor necessary in law. It would be extremely dangerous if titles, otherwise impregnable and supported by long enjoyment, could be overturned by evidence of that kind. 'It is the wise policy of the law,' said Mr. Justice *Heath*, in the celebrated gleaning case (*Steel* v. *Houghton* (3),) 'not to construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligation.'"

And Lord *O'Hagan* says (4): "It was insisted that the jury should have been further asked to consider whether the respondent and his predecessors had abandoned the right to a several fishery? I think that the appellants made no case of abandonment which should have been submitted. Without discussing the view of one of the learned Judges of the Exchequer, that,

(1) 8 App. Cas. 154.
(2) Ibid. 156.
(3) 1 H. Bl. 60.
(4) 8 App. Cas. 170.

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'in point of law it is not possible for an abandonment to take place of a fishery in the manner suggested,' it may be enough to say that no sufficient authority to the contrary has been adduced, and that a mere interruption of the possession under an established title in such a property cannot be held to have destroyed it. An interruption may have been permitted through the absence of the proprietor; or through his ignorance, partial or complete, of the acts relied on; or through his neglect or indifference to them as not vitally affecting, in his own case, his interest or position; or as requiring from him, for the purpose of resistance, effort or expense unjustified by the necessity of the case; or, as allowed from kindly or benevolent motives to humble people for a great length of time. And it would not seem just, as it would not be legal, on the ground of such an interruption, so tolerated, to pronounce the forfeiture of his vested estate."

The facts proved in the present case are, in my opinion, wholly insufficient to defeat the clear title proved by the Plaintiff, both on paper and by acts of possession and ownership extending over many hundred years. As a conclusion of fact I have not any doubt that the practice of fishing which has existed has arisen from the liberality and indulgence of the owners of the fishery; and the legal inference from the facts proved is the same. Lord *Watson* says in *Goodman* v. *Mayor of Saltash* (1): "It may be matter of legal inference that their"—the inhabitants'—"possession was attributable to mere tolerance, although, in point of fact, they fished as in the assertion of a right; and I think that must be the inference in law, unless it can be shewn that the right which they asserted is capable of having a legal origin." There is a strong confirmation of this view of the facts in the evidence of one of the witnesses.

It will be remembered that Miss *Payn* was owner of this fishery, and of the house on the bank, also called "*The Fishery*," from 1821 to 1854: and the witness in question, *William Walter Gillum*, was her gardener there from 1848 to 1853. He said that he remembered *Mount*, one of the keepers of the *Thames Trout Club*; and that when he was mowing the lawn at three, four, or five in the morning, and during the day, he often saw *Mount* walking

(1) 7 App. Cas. 664.

down the river to look after it and see there was no poaching. He also said that he remembered Miss *Payn* having the right to the fishing, but never knew her object to any one angling: and he recollected on one occasion a gentleman, fishing from a boat when she was on the lawn, asking her whether she had any objection to boats coming near her house for angling; and that she replied, Oh, no, she had no objection: and that if she had any she could not help it, as the *Thames* was a navigable river. This witness was called by the Defendant. He seemed an intelligent and credible man; and, though he was speaking of what occurred about forty years ago, I see no reason to doubt that what took place was in effect as stated. This incident, so far as it goes, seems to me adverse to the Defendant's case, in three ways. First, it shews that on that occasion, at any rate, the angler was not fishing in exercise of any alleged right; for if so he would not have asked the lady with her gardener on the bank (who presumably therefore was, as he took her to be, owner of the land and water adjoining it), whether she had any objection to his fishing there. His conduct shews that he, at any rate, thought Miss *Payn* had a right to object; and, like a gentleman, he asked her leave. Secondly, it shews that for the thirty-three years Miss *Payn* was owner (being the earliest evidence we have on the subject) she as a matter of fact was willing that any one should fish her water who liked: and her abstention from interference is thus fully explained and accounted for. And, thirdly, this conversation supplies an explanation and possible reason why objections were not made by owners oftener than they were; viz., because persons navigating the *Thames* were believed to have consequently a right to fish there. This was, of course, a complete mistake in point of law: but the existence and prevalence of such a mistaken belief is a factor which cannot be left wholly out of sight when we are considering whether any ground exists for saying that the omission by the owners to prevent anglers in boats from fishing throws any doubt upon the otherwise clear title of such owners to the fishery.

[His Lordship then referred to the evidence of some other witnesses, and proceeded:—]

Then further, the very fact of the formation of the *Thames*

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Trout Club, and their renting the fishery, and paying keepers to protect it and to keep away poachers, is scarcely intelligible if all the world had notoriously at that time a right to do everything which the club could, without payment. As regards Miss *Payn's* successors there is no evidence to shew that the fishing by the public ever caused any annoyance to them; and as regards the Plaintiff and her trustee Mr. *Tyrrell Lewis*, it is clear that they have never objected to the public fishing, or endeavoured to prevent them from so doing. They have done their best to prevent fishing without leave, in open assertion of a hostile claim of right; but they have always been willing to give and have given leave to all applicants, and there is no evidence that leave was ever refused to any one who asked for it. We know that the Plaintiff's agent on more than one occasion offered to give the Defendant written permission to fish, and he refused it. Then with respect to the lessees I do not see how such fishing as there was by the public ever interfered practically with them. Their netting and eel fishing were not interrupted. They always had such angling as they wanted for themselves or their customers, and one can quite understand why under these circumstances they did not think it worth while to spend their time in running after other fishermen to warn them off, or to cause ill-feeling between them and their neighbours by adopting the dog in the manger policy of depriving others of the enjoyment of that which they did not require for themselves. It must be remembered that it is clearly proved that there was some interference from time to time with anglers from both bank and boat, and that it is conceded that it was a trespass on the fishery for an angler standing on the bank to fish in the river.

The evidence of fishing by the public in general and the Defendant in particular being from both bank and boat, there would be extreme difficulty in holding that evidence which is admittedly insufficient to establish the right of an angler to fish the river from the bank could suffice to prove any right on the part of the same person to do the same thing from a boat or punt, which is what the Defendant is driven to contend for. Why, then, should I conclude that the anglers who, in limited numbers in times gone by, did, in fact, fish in this part of the *Thames*

without being interfered with, did so upon any other footing than that upon which the largely increased body of anglers of recent years have done so—by the permission and sufferance of the proprietors, voluntarily conceded, wherever it could be done without giving colour to a hostile claim?

There is one other matter I have to mention. I find that in *Blount* v. *Layard* (1), Lord Justice *Bowen* spoke as follows: "Although the public have been in the habit as long as we can recollect, and as long as our fathers can recollect, of fishing in the *Thames*, the public have no right to fish there—I mean they have no right as members of the public to fish there. That is certain law. Of course, they may fish by the licence of the lord or the owner of a particular part of the bed of the river, or they may fish by the indulgence, or owing to the carelessness or good nature, of the person who is entitled to the soil, but right to fish themselves as the public they have none. . . . If the defendant had attempted to set up uninterrupted fishing by the public in the main stream as evidence of a right in the public to fish, the attempt ought certainly to fail. No judge ought to have allowed such evidence to be given, because you cannot set up by evidence a right which does not exist in law."

Notwithstanding those remarks I felt bound to, and did, admit such evidence as is there referred to, and for this reason. However strong the title of a person claiming a fishery may look, the fact that he and his predecessors have allowed the public to fish, with their knowledge and in their sight, for a long period without interruption or objection is a legitimate topic for the Defendant to insist upon before the judge or jury who have to decide the issue of fact; not, indeed, as shewing that the Defendant has a right to fish, but as discrediting the claimant's title, and tending to shew that his title cannot really be as good as he says, or he never would have allowed such acts to be done constantly and openly; and therefore that there is some infirmity, or he believes there is, in his title. I have considered the evidence carefully from this point of view. The real title must, of course, be vested in some person. Who or where is this owner with the better title of which the Plaintiff is to be assumed to

(1) *Ante*, p. 689, n.

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be afraid, and how is his non-interference for so long to be accounted for? I am invited to hold that the omission by the Plaintiff and her predecessors to warn off trespassers is to defeat her otherwise clear title by reason of the theoretical possibility that it may be accounted for by a secret knowledge or belief or suspicion on her part of the existence of some hypothetical owner with a hypothetically better title who has never been seen or heard of by any one, and has never interfered with any trespasser at all: and one, moreover, whose better title, if he ever had one, must have long since been defeated by the proved paper title and actual possession of the Plaintiff, and those through whom she claims: see the observations of Lord *Selborne* on *Lord Rivers* v. *Adams* (1). I decline to come to any such conclusion. I say unhesitatingly that in my opinion the absence of interference with the public is attributable entirely to the causes I have before mentioned, and not in any degree to knowledge, belief, or suspicion of the existence of any latent defect in the Plaintiff's title.

The result is the Plaintiff succeeds on all points; and I am prepared to make a declaration that she is owner in fee simple in possession of the several fishery described in the first paragraph of the statement of claim, and of the bed and soil of the *Thames* within the same limits, and to grant a perpetual injunction to restrain the Defendant from fishing or disturbing or attempting to catch fish in, or otherwise trespassing upon the said fishery without the leave of the Plaintiff, her heirs, or assigns. The statement of claim also asks me to restrain him from trespassing on the land forming the bed or soil of the *Thames*; but I see no reason for extending the injunction thus, as the injunction as I propose to make it covers all the Defendant has done, and his right to use this part of the *Thames* as a navigable highway, in common with the rest of the public, has not been and cannot be disputed. The costs must, of course, follow the event.

Solicitors for Plaintiff: *Tyrrell Lewis & Co.*
Solicitors for Defendant: *Bernard Abrahams & Co.*

(1) 8 App. Cas. 647.

D. P.

END OF VOL. II.

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ACCUMULATIONS—*Will—Trust—Settled Land—Annuitant—Tenant for Life—Surplus Income—Capital Money—"Improvements"—Improvement of Landed Estate—Maintaining Houses in good habitable repair—Building Houses—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Settled Land Act*, 1882, *ss.* 2 (*sub-ss.* 5, 8), 25, 26, 58 (*sub-s.* 5).] A testator directed his trustees to invest his residuary moneys, together with all accumulations, in the purchase of a landed estate, and that out of the income thereof an annuity should be paid to his nephew for life, and that the surplus income should from time to time during the life of the nephew be expended in the purchase of additional land, "or in the improvement of the landed estate, and in maintaining in good habitable repair houses and tenements on the property"; and that, on the death of the nephew, his son (if any) should have a life interest in the whole of the landed property, subject to one-third of the yearly rental being expended year by year in improving, keeping up, or extending the estate; with remainder to the male heir of his nephew in succession for ever.—The testator died in 1865. His nephew survived him and had a son, an infant. Shortly after the testator's death an action was commenced for the administration of his estate, and a receiver was appointed. Subsequently the trustees purchased out of money in Court, representing the testator's residuary estate, a freehold estate, which was conveyed to them upon the trusts of the will. Under an order made in the action the income of the testator's estate, after keeping down the annuity to the nephew and providing for repairs, was, during twenty-one years from the testator's death, invested and accumulated. Upon the expiration of the twenty-one years a further order was made directing the receiver, after keeping down the annuity "and maintaining in good habitable repair the houses and tenements on the property," to divide the residue of the income, as from the expiration of the twenty-one years, among the testator's next of kin; whereupon the receiver

ACCUMULATIONS—*continued.*

applied part of the income of the landed estate, after keeping down the nephew's annuity, in repairs and "improvements" on the estate. The question was then raised, on a summons by the next of kin, whether the trust or direction in the will to expend surplus income in improvements was not, though indirectly, a trust or direction for "accumulation," and therefore void, under the Thellusson Act, after the expiration of twenty-one years from the testator's death; and thus whether the expenditure by the receiver for such purposes was valid:—*Held*, by Chitty, J., that the trust or direction, being in the nature of a discretionary trust to apply, in due course of administration, a portion of the income for the purpose of improving the property, did not fall within the Thellusson Act, and was therefore good; and accordingly the order made on the summons declared "that the trust for improvement and maintenance contained in the will was valid, notwithstanding the expiration of twenty-one years from the testator's death." On appeal that order was affirmed, but with an addition that the declaration "was not to authorize the application of income to purposes the expense of which ought to be defrayed out of capital": the trustees thus having power to apply to the Court for direction in case of difficulty.—*Per* Chitty, J.: The distinction between a trust to improve land and to purchase land is well settled: under the former you cannot buy land; under the latter you cannot improve land, although you may build a new house, which is regarded as acquiring land: *Drake* v. *Trefusis* (Law Rep. 10 Ch. 364).—*Per* the Court of Appeal: All improvements in substance, which could in any fair sense be regarded as coming under the words "maintaining in good habitable repair houses and tenements on the property," are outside the Thellusson Act altogether. Money laid out in building houses on the land would be within the Act. VINE *v.* RALEIGH - - - - - C. A. 13

ACKNOWLEDGMENT—Married woman—Equity to a settlement - - - 335
See SETTLEMENT.

ADEMPTION—Satisfaction of legacy—Double portions - - - - 482
See WILL. 3.

ADVERTISEMENT—Petition for winding-up—Amendment - - - 151
See COMPANY. 10.

AMENDMENT—Petition for winding-up - 151
See COMPANY. 10.

—— Writ—Fresh cause of action - - 31
See PRACTICE. 4.

APPEARANCE—Default in—Amended writ 121
See PRACTICE. 1.

APPOINTMENT - - - 662, 671
See POWER. 1, 2.

ASSIGNMENT—Patent—Injunction to restrain threats - - - - 573
See PATENT.

AUCTIONEER—*Conversion of Chattels—Title of Plaintiffs to sue—Liability of Auctioneers—Evidence—Practice.*] The possession of chattels by a cestui que trust in accordance with the provisions of the trust instrument is in law the possession of the trustees, who can maintain an action against a wrongdoer for the conversion of the chattels, and the Defendant cannot set up as an answer the title of a third person who has not asserted, or who waives, his claim to the chattels. —If a broker or auctioneer only settles the price as between vendor and purchaser of goods, and takes his commission, he is not liable as for conversion if the vendor is not entitled to sell. But where an auctioneer receives goods into his custody, and on selling them hands them over to the purchaser with a view to passing the property in them, he is to be treated as having converted the goods, and is liable to an action accordingly, his case differing from that of a packing agent or carrier in that they merely purport to change the position of the goods and not the property in them.—After the Defendant's case had been closed, an application by the Plaintiff's counsel for leave to call as his witness a defendant whom he had expected to be called in support of his (the Defendant's) own case refused, Plaintiff's counsel admitting that he had not been misled by any representation to the effect that the defendant would be called. BARKER *v.* FURLONG [172

BILL OF COSTS—Taxation - 102, 289
See SOLICITOR. 1, 2.

CALL—Company—Power of liquidator - 580
See COMPANY. 11.

CAPITAL—Income—Company—Distribution of surplus assets - - - 317
See COMPANY. 12.

—— Reduction of - - - 124, 354
See COMPANY. 5, 6.

CASES—*Bolton* v. *Buckenham* ([1891] 1 Q. B. 278) followed - - - - 48
See PRINCIPAL AND SURETY.

—— *Bouch* v. *Sproule* (12 App. Cas. 385) considered - - - - 317
See COMPANY. 12.

CASES—*continued.*

—— *Chamberlain, Ex parte* (14 Ch. D. 323) doubted - - - - 630
See LANDS CLAUSES ACT.

—— *Charles* v. *Burke* (43 Ch. D. 223, n.) followed - - - - 671
See POWER. 1.

—— *Christie* v. *Ovington* (1 Ch. D. 279) approved [567
See TRUSTEE. 2.

—— *Clark* v. *Taylor* (1 Dr. 642; 1 W. R. 476) considered - - - - 236
See CHARITY.

—— *Cradock* v. *Piper* (Mac. & G. 664) followed [363
See SOLICITOR. 3.

—— *Cunynghame* v. *Thurlow* (1 Russ. & My. 436, n.) followed - - - 662
See POWER. 2.

—— *Dean* v. *MacDowell* (8 Ch. D. 345) followed [244
See PARTNERSHIP.

—— *Drake* v. *Trefusis* (Law Rep. 10 Ch. 364) considered - - - - 13
See ACCUMULATIONS.

—— *Evans, In re* (42 L. J. (Ch.) 357) distinguished - - - - 630
See LANDS CLAUSES ACT.

—— *Fenwick* v. *East London Railway Company* (Law Rep. 20 Eq. 564) distinguished [409
See NUISANCE.

—— *Flower* v. *Sadler* (10 Q. B. D. 572) distinguished - - - - 587
See CONTRACT.

—— *Government Stock Investment Company, In re* ([1891] 1 Ch. 649) distinguished 395
See COMPANY. 3.

—— *Hayter* v. *Trego* (5 Russ. 113) considered [236
See CHARITY.

—— *Hodgson* v. *Hodgson* (2 Keen, 704) considered - - - - 48
See PRINCIPAL AND SURETY.

—— *Holme* v. *Brunswick* (3 Q. B. D. 495) considered - - - - 48
See PRINCIPAL AND SURETY.

—— *James, Ex parte* (Law Rep. 6 Ch. 609) followed - - - - 154
See MISTAKE OF LAW.

—— *Jenkins* v. *Bushby* ([1891] 1 Ch. 484) explained - - - - 551
See PRACTICE. 6.

—— *Jones* v. *Westcomb* (1 Eq. C. M. 245) distinguished - - - - 640
See WILL. 2.

—— *London Quays and Warehouses Company, In re* (Law Rep. 3 Ch. 394) followed 55
See COMPANY. 13.

—— *Lumley* v. *Wagner* (5 De G. & S. 485; 1 D. M. & G. 604) discussed - 416
See MASTER AND SERVANT.

—— *Montague* v. *Flockton* (Law Rep. 16 Eq. 189) disapproved - - - - 416
See MASTER AND SERVANT.

—— *Morgan* v. *Swansea Urban Sanitary Authority* (9 Ch. D. 582) considered - 567
See TRUSTEE. 2.

CASES—*continued.*

—— *Morton* v. *Hallett, In re* (15 Ch. D. 143) followed - - - - 567
See TRUSTEE. 2.

—— *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) distinguished - - - 505
See COMPANY. 7.

—— *Peek* v. *Derry* (37 Ch. D. 541; 14 App. Cas. 337) considered - - - 449
See COMPANY. 4.

—— *Peel's Case* (Law Rep. 2 Ch. 674) distinguished - - - - 505
See COMPANY. 7.

—— *Pomfret* v. *Perring* (5 D. M. & G. 775) considered - - - - 671
See POWER. 1.

—— *Prater, In re* (37 Ch. D. 481) considered
See WILL. 1. [559

—— *Price* v. *M'Beth* (33 L. J. (Ch.) 460) not followed - - - - 383
See SOLICITOR. 3.

—— *Roberts* v. *Kuffin* (2 Atk. 112) distinguished
See WILL. 1. [559

—— *Rochdale Property and General Finance Company, In re* (12 Ch. D. 775) followed
See COMPANY. 13. [55

—— *Spencer's Trade-marks, In re* (3 Rep. Pat. Cas. 73) discussed - - - 522
See TRADE-MARK. 3.

—— *Simmonds, Ex parte* (16 Q. B. D. 308) followed - - - - 154
See MISTAKE OF LAW.

—— *Ward* v. *Lloyd* (6 Man. & G. 785) distinguished - - - - 587
See CONTRACT.

—— *Western National Bank of New York* v. *Perez* ([1891] 1 Q. B. 304) followed 31
See PRACTICE. 4.

—— *Wheatley* v. *Bastow* (7 D. M. & G. 261) considered - - - - 48
See PRINCIPAL AND SURETY.

—— *Winder, Ex parte* (6 Ch. D. 696) distinguished - - - - 630
See LANDS CLAUSES ACT.

CERTIFICATE—Registration of company—Conclusiveness - - - - 505
See COMPANY. 7.

CHARGING ORDER—Lunatic—Judgment of the lunacy - - - - - 1
See LUNATIC.

CHARITY—*Will—Particular Charity—Lapse—Cy-près.*] A charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid, does not fail for the benefit of the residuary legatee, as in the ordinary case of a lapse through failure of the object in the testator's lifetime: the property in the legacy falls to be administered by the Crown and will ordinarily be applied for charitable purposes.—A testator gave a number of legacies to various persons, using the introductory words, "I bequeath the pecuniary legacies following." He then gave a number of legacies to various institutions, churches, and bodies, using the introductory words: "I bequeath the following charitable legacies"; and amongst such last-mentioned legacies was one to an orphanage voluntarily maintained by a lady at her own expense, which was in existence at the testator's death, but was discontinued shortly afterwards, and before his assets were administered:—*Held* (reversing Stirling, J.), that on the death of the testator the legacy became the property of the orphanage; and that, on the orphanage ceasing to exist, the property in the legacy became applicable by the Crown for charitable purposes.—The doctrine of lapse as applicable to a legacy to a charitable object in existence at the death of the testator, but subsequently failing, discussed.—*Clark* v. *Taylor* (1 Drew. 642; 1 W. R. 476) and *Hayter* v. *Trego* (5 Russ. 113) considered. *In re* SLEVIN. SLEVIN *v.* HEPBURN - C. A. 236

CHARITY COMMISSIONERS — Consent — Endowed school—Dismissal of master 84
See ENDOWED SCHOOL.

CHOSE IN ACTION—Bequest of contents of desk—Securities - - - 559
See WILL. 1.

COMPANY — *Debenture-holders' Action — Insolvency—Receiver—Mortgage—Protecting Security—Principal and Interest not immediately payable.*] Upon the principle that a mortgagee is entitled to the protection of his security, the Court will, at the instance of a debenture-holder of a limited company, where the debenture creates a charge on the property and assets of the company, appoint a receiver of the property so charged, if the security is in jeopardy through the insolvency of the company, even though the principal secured by the debenture is not immediately payable and default has not yet been made in payment of interest. MCMAHON *v.* NORTH KENT IRONWORKS COMPANY - - - - - - 148

2. —— *Directors—Incorporation without Articles of Association—Subscribers of Memorandum of Association—Meetings of Subscribers—Notices—Companies Act*, 1862, *s.* 67; *Table A, arts.* 35, 52, 53, 58, 62, 71.] Art. 58 of Table A to the Companies Act, 1862, providing that "at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office," does not apply to mere de facto directors; nor does it apply to subscribers of the memorandum of association who, not having appointed directors under art. 52, are (by art. 53) "deemed to be directors"; it only applies to directors who have been duly appointed under the articles.—Art. 62 does not apply so as to continue mere de facto directors as directors till the ordinary meeting in the year next after that in which a meeting has been held at which an election of directors ought to have taken place, when no directors have been elected either at such earlier meeting or the adjournment thereof.—The power given by art. 52 to the subscribers of the memorandum, to determine who shall be the first directors, remains in force notwithstanding the first ordinary meeting after registration and the adjourned meeting held seven days afterwards, have been held without any directors being appointed thereat.—Art. 35, prescribing seven days' notice for summoning a meeting, only applies to general meetings of the company. Table A.

COMPANY—*continued.*

contains no special provision as to summoning meetings of subscribers of the memorandum of association, and only reasonable notice of such meetings is necessary. JOHN MORLEY BUILDING COMPANY *v.* BARRAS - - - - **386**

3. —— *Memorandum of Association—Alteration of Objects—Extension to New Business—Sanction of Court — Conditions — Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-ss.* 3, 5 (*d.*)] The memorandum of association of the "Foreign and Colonial Government Trust Company," incorporated in 1879, stated one of its objects to be to invest money in securities of foreign, or colonial, or British Governments, including municipal, ruling and public authorities, and shares and obligations of undertakings guaranteed by such Governments.—As the capital could no longer be advantageously invested in the securities mentioned in the memorandum, the Court was asked to confirm a proposed alteration therein, extending the class of investments to securities, bonds, debentures, and debenture-stock, obligations, and mortgages of companies and corporations formed or incorporated under British, foreign, or Colonial law:—*Held*, that, within sect. 1, sub-sect. 5 (*d*) of the Companies (Memorandum of Association) Act, 1890, "the business of the company" was the investment of money in the limited class of securities mentioned in the memorandum; that investment in the class specified in the proposed alteration was also a business which might be "combined with the business of the company;" and that the proposed alteration ought to be sanctioned; but subject to the condition that the name of the company should be so altered that persons dealing with it might not be misled into supposing that its investments were limited to Government securities. *In re Governments Stock Investment Company* ([1891] 1 Ch. 649) distinguished. *In re* FOREIGN AND COLONIAL GOVERNMENT TRUST COMPANY - - - **395**

4. —— *Misrepresentation—Prospectus—Action of Deceit—Onus Probandi—Negligence.*] If a person who makes a false statement entertains a bonâ fide belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reasons. If he had formed no belief whether the statement was true or false, and made it recklessly without caring whether it was true or false, an action of deceit will lie against him. But not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.—The directors of a company for purchasing and working a mine issued a prospectus containing a statement that the reports of certain engineers therein mentioned were "prepared for the directors." The reports were appended to the prospectus, and gave a very favourable account of the mine. The reports were, in fact, prepared for the vendors of the mine with a view to the formation of the company, but there was no evidence that they were incorrect or exaggerated. The Plaintiff took shares in the company on the faith of the prospectus, and the shares having

COMPANY—*continued.*

greatly fallen in value, he brought an action of deceit against the directors claiming damages. The Court held, on the evidence, that the directors had no intention to deceive, and used the expression, "prepared for the directors," carelessly, not thinking it important, and without considering the true effect of the words:—*Held* (reversing the judgment of Romer, J.), that the Plaintiff could not maintain an action of deceit against the directors for the misrepresentation. —In the absence of evidence that the reports were incorrect, *quære*, whether the falsity of the statement that they were prepared for the directors was material.—*Peek* v. *Derry* (37 Ch. D. 541; 14 App. Cas. 337) discussed. ANGUS *v.* CLIFFORD **[C. A., 449**

5. —— *Reduction of Capital—"Capital Lost or Unrepresented by Available Assets"—Preliminary Expenses—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9, 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 3.] Capital properly expended by a company in preliminary expenses cannot be treated as "lost capital or capital unrepresented by available assets," within sect. 3 of the Companies Act, 1877, so as to entitle the company to reduce its capital by the amount so expended. *In re* ABSTAINERS AND GENERAL INSURANCE COMPANY - - - - **124**

6. —— *Reduction of Capital—Sinking Fund—Payment off of Preference Shares—Advertisements—Inquiries as to Creditors—Companies Act*, 1877 (40 & 41 *Vict. c.* 26), *s.* 4.] The capital of a company was divided into ordinary and preference shares, which, by the memorandum, were to "have the rights specified in the articles of association." The articles provided for a preferential dividend, and for setting aside out of the net profits, a sum equal to 20 per cent. of the amount of the preference shares for the formation of a sinking fund to pay off the preference shares at the end of five years; subject to this, the rest of the net profits belonged to the holders of ordinary shares. The company proposed to pay off and cancel all the preference shares pursuant to the articles, and presented a petition for reduction on this basis:—*Held*, that the memorandum and articles of association created a valid contract, binding on both classes of shareholders, that a portion of the profits of the company should be set apart for the redemption and extinction of the preference shares; that the reduction, as proposed, did not involve a "payment to any shareholder of any paid-up capital" within the provisions of the Companies Act, 1877, s. 4, and that the order for reduction might be made without referring the petition to chambers for an inquiry and certificate as to creditors. *In re* DICIDO PIER COMPANY - - - **354**

7. —— *Registration—Memorandum of Association subscribed by fewer than Seven Persons—Certificate of Registration — Conclusiveness of Certificate — Winding-up — Jurisdiction —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 6, 18.] On a petition for the winding-up of a company, which was already being wound up voluntarily under supervision, a doubt was suggested whether the memorandum of association, although it purported to be signed by seven persons, was not

COMPANY—*continued.*

in fact signed by six persons only, one of the signatories having signed twice in different names:—*Held*, by Kekewich, J., and by the Court of Appeal, that the certificate of incorporation could not be treated as conclusive of the fact that seven persons signed the memorandum, and that if a less number had signed it the Court had no jurisdiction to make a winding-up order. But the Court of Appeal, being satisfied on the evidence that seven persons had in fact signed the memorandum, made the order asked for.—*Peel's Case* (Law Rep. 2 Ch. 674), and *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325) distinguished. *In re* NATIONAL DEBENTURE AND ASSETS CORPORATION - - - - - - C. A., 505

8. —— *Transfer of Shares—Non-registration of Transfer — Pre-existing Equitable Title to Shares.*] As between two persons claiming title to shares registered in the name of a third person in a company formed under the Companies Act, 1862, with articles of association regulating the transfer of its shares, the title prior in date prevails, unless the claimant second in point of time can shew that as between himself and the company he has before the receipt by the company of notice of the prior title, acquired the full status of a shareholder, or, at all events, that all the formalities have been complied with, and that some purely ministerial act alone remains to be done by the company which, as between himself and the company, the company would be bound to do forthwith. MOORE *v.* NORTH WESTERN BANK - - - - - - - 599

9. —— *Winding-up—Dissolution—Action by Creditor against Directors—Fraud—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 111.] After a company had been wound up under a compulsory order and dissolved under sect. 111 of the Companies Act, 1862, a creditor commenced an action against the late directors and official liquidator, seeking to make the directors liable for the alleged payment of dividends out of capital while the company was a going concern, or, at any rate for the dividends received by themselves, but not alleging fraud:—*Held*, on motion to strike out the statement of claim on the ground that it disclosed no reasonable cause of action, that the dissolution was, in the absence of any fraud being alleged, an absolute bar to the action. COXON *v.* GORST - - - - - - - - 73

10. —— *Winding-up — Practice—Petition—Amendment—Re-advertisement of Amended Petition.*] Where a petition praying that the voluntary winding-up of a company might be continued under the supervision of the Court was subsequently amended by praying in the alternative for a compulsory winding-up order:—*Held*, that the petition must be re-advertised. *In re* NATIONAL WHOLE MEAL BREAD AND BISCUIT COMPANY - - - - - - - 151

11. —— *Winding-up—Reconstruction — Contract making Shares payable by Instalments — Determination of Contract—Right of Liquidator to make Immediate Call—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 38, 98, 102.] A company was formed for the purpose of carrying into effect a contract for the purchase of the business of an existing company. Under this contract

COMPANY—*continued.*

(which in due course became binding on the new company) shareholders in the old company were entitled to shares in the new company, and payments in respect of such shares were to be made by certain specified instalments. Several shareholders in the old company accepted shares in the new company under the contract. Before the periods fixed for payment of some of the instalments had arrived, the new company was wound up:—*Held*, that the contract for payment by instalments was determined by the winding-up, and that, by virtue of sects. 7 and 102 of the Companies Act, 1862, the liquidator was entitled to make an immediate call for the amount remaining unpaid in respect of the shares. *In re* CORDOVA UNION GOLD COMPANY - - 580

12. —— *Winding-up—Surplus Assets—Contributories, Rights of, inter se—Ordinary and Preference Shareholders—Reserve Funds—"Profits"—Undrawn Profits—Capitalization—Capital—Income—Valuation.*] The articles of association of a canal company formed under the Companies Acts authorized the company by resolution to increase its capital, but, save as specified in any such resolution, all new capital was to be subject to the same provisions as the original capital; and the articles also provided that the directors might, in priority to any dividend, set aside out of "profits" any sum as a "reserve fund" for certain specified purposes, or "any other contingencies or purposes of the company," and might invest the same; that any interest derived from such investment should be dealt with as profits; and that, subject thereto, "the entire net profits of each year" should belong to the shareholders. Subsequently the company increased its capital by the issue of new shares carrying a preferential dividend. Year by year part of the profits of the company's business was carried to three reserved funds to meet (*a*) depreciation of steamers, (*b*) insurance, and (*c*) canal improvements; and the remaining profits, after providing for the preferential dividend, were distributed among the ordinary shareholders. These reserve funds were not represented by any separate or specific investments, but were merely book-keeping entries represented in the company's balance-sheets by property of various kinds.—The company's undertaking was eventually sold by special Act of Parliament at a price which left a surplus in excess of the liabilities of the company and the capital paid up on the ordinary and preference shares. The sale was completed during the currency of a financial year. On the completion of the sale the company passed resolutions for a voluntary winding-up. It had never been found necessary to resort to any of the reserve funds while the company was a going concern, and part of them had been in fact divided among the ordinary shareholders in the form of bonus; and at the date of the sale three funds representing these reserve funds were still standing in the company's books:—*Held* (varying order of North, J.), that all three funds represented undrawn "profits," uncapitalized, and to be therefore treated as income to which, subject to the preferential dividend for the broken financial year, the ordinary shareholders were exclusively

COMPANY—*continued.*

entitled, and not as "capital" or "assets" distributable among both the ordinary and the preference shareholders; also, that in taking the accounts for the broken year, the value of the plant and book debts should be taken at the actual ascertained values as stated in the stock-books, and not at the lower values at which the company had, according to their regular custom and from motives of prudence, estimated them in a previous annual balance-sheet on which a dividend had been declared; and that the difference between the two values represented undrawn profits to which, subject to preferential dividend, the ordinary shareholders were exclusively entitled.—The question as to when undrawn profits can be treated as capital, discussed.—*Bouch* v. *Sproule* (12 App. Cas. 385) considered. *In re* BRIDGEWATER NAVIGATION COMPANY C. A. 317

13. ——*Winding-up—Voluntary Winding-up under Supervision—Wishes of Creditors—Restrictions imposed on Liquidator—Committee of Inspection—Creditors' Representative—Form of Order—Companies Act*, 1862, *ss.* 95, 96, 133, *sub-ss.* 7, 149, 151—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 12.] The Court has jurisdiction, by placing restrictions on a voluntary liquidator, or by dispensing with restrictions on an official liquidator, almost to turn a winding-up under supervision into a winding-up by the Court, and a winding-up by the Court into a winding-up under supervision, thus adapting its orders to the exigencies of the particular case before it: *In re London Quays and Warehouses Company* (Law Rep. 3 Ch. 394), and *In re Rochdale Property and General Finance Company* (12 Ch. D. 775), discussed and adopted. Though the Companies (Winding-up) Act, 1890, has no application to a voluntary winding-up, it can be made use of by the Court for the purpose of placing restrictions on the liquidator's powers, analogous to those which the legislature has now imposed, if the creditors desire it, upon an official liquidator in a winding-up.—Form of order continuing a voluntary winding-up under supervision, subject to the control of a committee of inspection. *In re* WATSON & SONS, LIMITED 55

CONDITION—Gift of income during life or widowhood - - - - - 640
See WILL. 2.

CONDITION OF SALE—Title limited to forty years - - - - 109
See VENDOR AND PURCHASER. 1.

CONSIDERATION—Contract—Validity - 587
See CONTRACT.

CONSOLIDATED ORDERS, 1860, Order VII., r. 2
See PRACTICE. 5. [349

CONTRACT—*Agreement—Validity—Illegal Consideration—Stifling a Prosecution.*] The secretary of a building society who had made default and was threatened by the society with a prosecution for embezzlement, applied for assistance to the Plaintiffs, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the Plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes to the society. The Plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and this was known to the directors of the society:—*Held*, that it was an implied term of the agreement that there should be no prosecution, that the agreement was founded on an illegal consideration and void, and that the promissory notes ought to be set aside.—*Ward* v. *Lloyd* (6 Man. & G. 785) and *Flower* v. *Sadler* (10 Q. B. D. 572) explained and distinguished. JONES v. MERIONETHSHIRE PERMANENT BENEFIT BUILDING SOCIETY - - - - 587

—— Service—Agreement to give whole time—Injunction - - - - 416
See MASTER AND SERVANT.

CONVERSION—Auctioneer—Liability - 172
See AUCTIONEER.

COPYRIGHT—*International Copyright—Foreign Painting—English Copyright—Registration—Right to sue for Infringement—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45)—*International Copyright Act*, 1844 (7 & 8 *Vict. c.* 12)—*Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68)—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33)—*Berne Convention—Order in Council, Nov.* 28, 1887.] In order to entitle the owner of the English copyright in a foreign painting to sue in this country in respect of an infringement of such copyright, it is not necessary for him to have registered his ownership under the International Copyright Acts, but he must have previously registered himself as proprietor of the copyright under sect. 4 of the Copyright Act, 1862. FISHBURN v. HOLLINGSHEAD - - - 371

COSTS—Taxation - - 102, 289, 363
See SOLICITOR. 1, 2, 3.

COVENANT—*Injunction—Restrictive Covenant—Occupier.*] The owners of the freehold reversion in a house sued A. and his son B. to restrain them from using the house in such a way as to break a restrictive covenant contained in a lease of it granted by the Plaintiffs' predecessor in title. The house was vested in B. for a term under an underlease which had been assigned to him. It was not shewn that A. had any estate legal or equitable in the house, but there was evidence to shew that he was in substance managing the business carried on there in which B. took part. Kekewich, J., came to the conclusion that B. was a trustee of the underlease for A., and granted an injunction against both of them. A. appealed, alleging that he had no estate or interest in the house, and that an injunction could not be granted against him:—*Held*, by the Court of Appeal, that the evidence shewed A. to be in joint or sole occupation of the house and to be managing the business in it with notice of the covenants, and that even if he was nothing more than a mere occupier he was liable to an injunction to restrain him from using the house in a way forbidden by the restrictive covenants. MANDER v. FALCKE - - C. A. 554

CY-PRÈS—Charity - - - - 236
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DEATH—Gift over on death of widow—Ambiguity - - - - - 640
See Will. 2.
—— Mortgagor during foreclosure action—Representative - - - 81
See Mortgage. 1.
DEBENTURE-HOLDER—Action by—Receiver [148
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See Practice. 1.
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DISSOLUTION OF COMPANY—Action against directors - - - - 73
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DOUBLE PORTIONS—Presumption - 482
See Will. 3.

ENDOWED SCHOOL — *Charity — Dismissal of Schoolmaster—Injunction—Right to sue—Consent of Charity Commissioners—Charitable Trusts Act,* 1853 (16 & 17 *Vict. c.* 137), *s.* 17.] The deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes, and power was given to the three vicars to remove the master for certain specified causes. The Plaintiff was appointed master of the school in April, 1890, and in December, 1890, two of the vicars served on him a notice of dismissal, signed by themselves, which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of the Plaintiff's dismissal, and he had not had any opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted. The Plaintiff commenced an action against the two vicars who had signed the notice, and moved for an interlocutory injunction to restrain them from removing, or purporting to remove, him from his office until after the holding of a meeting of the vicars, and until he should have had an opportunity of being heard at such a meeting in reply to any charges made against him:—*Held*, that the Defendants could not remove the Plaintiff without first affording him an opportunity of being heard in his own defence at a properly constituted meeting of the vicars, and that he was entitled to the injunction:—*Held*, also, that for the purpose
ENDOWED SCHOOL—*continued.*
of obtaining this relief it was not necessary, under sect. 17 of the Charitable Trusts Act, 1853, to obtain the consent of the Charity Commissioners to the bringing of the action. Fisher *v.* Jackson [84
EQUITY TO A SETTLEMENT - - 335
See Settlement.
EVIDENCE—Calling defendant as witness 172
See Auctioneer.
—— Prescription—Several Fishery 678, 681, n.
See Fishery. 1, 2.
EXECUTOR—*Power—Executor renouncing.*] A testator bequeathed a legacy to A. H. to be paid to her on attaining sixteen; in the event of her dying under that age "the amount to remain at the disposal of my executors for distribution to such charities or charitable institutions as they approve of." After bequeathing other legacies, he appointed C., F., and J. his executors. He then bequeathed legacies to several charitable institutions, and bequeathed the residue "to the above-named charitable institutions, or such others or additional as my executors herein named may select, to be divided in such proportions as they may approve of." C. and J. proved the will. F. renounced probate:—*Held* (reversing the decision of Kekewich, J.), that F. could not act in the exercise of the power of selecting charities and distributing the residue amongst them:—*Held*, that the power was given to the executors in the character of executors, and that the two who had proved could exercise it alone. Crawford *v.* Forshaw - - - - C. A. 261
FATHER—Rights of — Religious education of children—Abandonment - - 299
See Infant.
FISHERY—*Several Fishery—Navigable non-tidal River—Public—Prescription — Evidence— Public User—Rate Books.*] The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it be navigable.—In an action for trespass on a several fishery evidence of fishing by the public as of right was admitted in derogation of the Plaintiff's title. Entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the lessors, the Plaintiff's predecessors in title. Smith *v.* Andrews - C. A. 678
2. —— *Several Fishery — Non-tidal River—Right of Public—Prescription—Evidence—Rate-books.*] The public cannot by prescription acquire a legal right to fish in a non-tidal river. Assessments of property made by public officers in parish rate-books are admissible as evidence in proof of ownership of a several fishery. Blount *v.* Layard - - - - - 681, n.
FORECLOSURE—Practice - - - 79, 81
See Mortgage. 1, 2.
FRAUD—Action of deceit—Gross negligence 449
See Company. 4
—— User of trade-mark — Refusal of registration - - - - 166
See Trade-Mark. 2.

GUARDIAN—Infant—Religious education 299
See INFANT.

HUSBAND AND WIFE—Wife's equity to a settlement - - - - 335
See SETTLEMENT.

ILLEGALITY—Contract to stifle prosecution 587
See CONTRACT.

IMPROVEMENT OF LAND—Accumulations—Thellusson Act - - - 13
See ACCUMULATIONS.

INFANT — *Guardian — Religious Education — Abandonment of Father's Right — Antenuptial Agreement as to Religion of the Children—Wishes of Deceased Parents—Costs.*] Before the marriage of a Protestant with a Roman Catholic wife, the husband and wife signed an undertaking that all the children of the marriage should be brought up Roman Catholics. There was only one child of the marriage, a girl, who with the father's consent was baptized as a Roman Catholic. When the child was about three years old, the father, who was in destitution, died at the house of Miss M., a Protestant cousin of the wife, who was in good circumstances and had been kind to the family. The father on his death-bed had commended his wife and child to her, and appointed no guardian. Soon after his death, the child, with the consent of her mother, who was statutory guardian, went to live with and was maintained by Miss M., with whom she remained till she was seven years old, and there was a strong attachment between them. The mother then died, without appointing a guardian. After her death, her brother, who was a Roman Catholic, insisted that the child should be brought up a Roman Catholic, took her away from Miss M. by force, and sent her to America, whence she was brought back under habeas corpus proceedings instituted by N., a Protestant brother of the father. Nothing had been said to Miss M. by either father or mother as to the religious education of the child:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that, as the child had no parent or guardian, the Court had only to consider what was for her welfare, having due regard to the wishes of the father as to religious education—that the antenuptial agreement was not binding on the father, and that, though he acted during his life on the view that the child was to be brought up as a Roman Catholic, he was at liberty to change his mind, and that it could not be inferred that in the events which had happened he would have wished the child to be taken from Miss M., in order that she might be brought up a Roman Catholic—a course which, in the opinion of the Court, would not be for her benefit. Miss M. and N. were therefore appointed guardians, and the child was delivered to Miss M., with liberty to bring her up as a Protestant. *In re* NEVIN (AN INFANT) - - - C. A. 299

INJUNCTION—Contract of service—Agreement to give whole time - - - 416
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—— Libel—Jurisdiction - - 269, 294
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INJUNCTION—*continued.*

—— Mandatory—Erection of buildings after notice - - - - - 27
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—— Patentee—Threats—Action for infringement - - - - - 573
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—— Restrictive covenant—Occupier of house—Notice - - - - 554
See COVENANT.

JUDGMENT CREDITOR—Lunatic—Charging order - - - - - 1
See LUNATIC.

JURISDICTION—District registrar—Liverpool and Manchester districts - - 433
See PRACTICE. 2.

—— Libel—Injunction - - 269, 294
See LIBEL. 1, 2.

—— Local Government Board—Expenses of sewering street—Appeal - - 606
See LOCAL GOVERNMENT ACTS.

—— Service out of - - - 31, 63
See PRACTICE. 4, 7.

—— Trustee—Repayment of profit costs - 360
See TRUSTEE. 1.

LAND TRANSFER ACT—"Bare trustee" 567
See TRUSTEE. 2.

LANDS CLAUSES ACT (8 & 9 *Vict. c* 18), *s.* 79 — *Compulsory Purchase of Land — Payment of Purchase-money to Person in Possession—Property held for Residue of Term—Reversioner unknown—Right to value of Reversion after Expiration of Term.*] A house, which was held for the residue of a term of 300 years, to expire in 1878, was in 1866 taken compulsorily by a public body under the provisions of the Lands Clauses Consolidation Act, 1845. No rent had been paid by the tenant for many years, and the reversioner was unknown. The value of the house was ascertained, and in 1869 the value of the leasehold interest was paid to the tenant, and a sum representing the value of the reversion was paid into Court. In 1890, twelve years after the term had expired, no claim having been made in the meantime to the value of the reversion, the tenant applied that the fund in Court might be paid out to him, as the person who was in possession of the house at the time when it was taken:—*Held* (affirming the decision of North, J.), that, as the tenant had never had any possession, even inchoate, of the reversion at the time when the house was taken, he was not the person "in possession" of the house within the meaning of sect. 79 of the Act, and was not entitled to the fund.—*Re Evans* (42 L. J. (Ch.) 357), and *Ex parte Winder* (6 Ch. D. 696) distinguished.—*Ex parte Chamberlain* (14 Ch. D. 323) doubted. GEDYE *v.* COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS - C. A. 630

LEGACY—Satisfaction—Double portions - 482
See WILL. 3.

LEGACY DUTY—*Revenue—Will—Trust to carry on Testator's Business in conjunction with his Son—Bequest of Annual Sum to Trustees while carrying on the Business—Bequest of Annual Sum to*

LEGACY DUTY—*continued.*

Son while managing the Business in conjunction with the Trustees—Stamp Duties Act, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.] A manufacturer, by his will, gave his factory and business to trustees upon trust to carry on the business in conjunction with his son, and declared that, while the trustees should be carrying on the business, each of them should receive the annual sum of £250 out of the profits thereof, and that, while his son should be managing the business in conjunction with the trustees, he should be entitled to the said annual sum of £250 more:—*Held*, by the Court of Appeal (affirming the judgment of North, J.), that the sums received by the trustees and by the son, in pursuance of these directions, were legacies, and liable to legacy duty under sect. 4 of the Stamp Duties Act, 1845. *In re* THORLEY. THORLEY *v.* MASSAM. - - - **C. A. 613**

LIBEL—*Injunction—Jurisdiction — Discretion—Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable.—An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so.—Decision of North, J., granting an interlocutory injunction to restrain the publication of an alleged libel, reversed, Kay, L.J., dissenting. BONNARD *v.* PERRYMAN - **C. A. 269**

2. —— *Interlocutory Injunction.*] The Defendant having published a document containing charges of fraud, perjury, and conspiracy against the Plaintiff, the Plaintiff brought an action for libel, and recovered judgment for £1000 damages, of no part of which could he obtain payment. The Defendant continued to publish documents repeating the same charges, and the Plaintiff commenced the present action for an injunction and damages:—*Held*, by North, J., and by the Court of Appeal, that though the Court had jurisdiction to grant an interlocutory injunction to restrain further publication of the libel, there was in this case no reason to apprehend any such danger of injury to the Plaintiff in person or property as to make it right to grant one. SALOMONS *v.* KNIGHT [**C. A. 294**

LIQUIDATOR—Official—Money received under mistake of law—Order to repay **154**
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—— Power to make calls - - - **580**
See COMPANY. 11.

—— Restrictions on - - - - **55**
See COMPANY. 13.

LOCAL GOVERNMENT ACTS—*Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257, 268—*Expenses of Sewering Street—Recovery of by Urban Authority—Charge—Legal and other Expenses whether included—Jurisdiction—Appeal to Local Government Board.*] A local board, under the powers of the Public Health Act, 1875, executed paving and other works in a street, and sought to charge the Defendants with an apportioned amount of the expenses. In the amount apportioned was comprised an estimated sum in respect of legal and other expenses, including expenses of collection.—In an action by the local board to enforce their charge, the Defendants not only disputed their liability to payment, but contended that the estimated sum was not properly included, in the apportionment. Chitty, J., decided in favour of the Plaintiffs on both points.—The Court of Appeal affirmed the judgment of Chitty, J., as to the liability of the Defendants, and:—*Held*, that it was not competent to the Defendants to raise the objection in respect of the estimated sum in the present proceedings, and that the only remedy open to them on this point was by way of appeal to the Local Government Board under sect. 268 of the Act of 1875. WALTHAMSTOW LOCAL BOARD *v.* STAINES - - - - - **C.A. 606**

LUNATIC—*Judgment Creditors of — Charging Orders — Fund in Court — Death of Lunatic—Validity of Charging Orders*—1 & 2 *Vict. c.* 110, *s.* 14—3 & 4 *Vict. c.* 82, *s.* 1.] The effect of a charging order made by a Judge in favour of a judgment creditor under 1 & 2 Vict. c. 110, does not depend upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment; and the 14th section of that Act, and the proviso in the 1st section of 3 & 4 Vict. c. 82, must be read as meaning that the judgment creditor is to have the same remedies, and the order of the Judge the same effect, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor.—Creditors of a lunatic, whose debts were incurred before the lunacy, after the lunacy obtained judgments against him, and also orders charging a fund in Court in the lunacy with the amounts of their respective judgments, which orders were not in terms enforceable until the death of the lunatic or further order.—The lunatic died insolvent, and upon an application by his administratrix for payment out of the fund:—*Held*, that the charging orders were valid and effective, and that the judgment creditors were entitled to be paid the several amounts due thereon respectively out of the fund before transfer of any part thereof to the administratrix. *In re* LEAVESLEY - - - **C. A. 1**

MASTER AND SERVANT—*Contract of Service—Manufacturer's Manager — Agreement to give Whole Time—Absence of Negative Stipulation—Breach of Contract — Injunction — Specific Performance.*] The manager of a manufacturing company agreed to give during a specified term "the whole of his time to the company's business":—*Held* (reversing the decision of Kekewich, J.), that (whatever other remedies the company might have), in the absence of any negative stipulation in that behalf, they were not entitled to an injunction to restrain the manager from giving, during the term, part of his time to a rival company.—*Lumley* v. *Wagner* (5 De G. & Sm. 485; 1 D. M. & G. 604) discussed.

MASTER AND SERVANT—*continued.*

—*Montague* v. *Flockton* (Law Rep. 16 Eq. 189) disapproved. WHITWOOD CHEMICAL COMPANY *v.* HARDMAN - - - - C. A. 416

MEETING OF SHAREHOLDERS—Subscribers of memorandum—Notice - - 386
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MEMORANDUM OF ASSOCIATION—Alteration of - - - - - - 395
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—— Subscribers to - - - - - 386
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MISREPRESENTATION IN PROSPECTUS 449
See COMPANY. 4.

MISTAKE OF LAW—*Officer of the Court—Company—Winding-up—Execution—Assets increased by Honest Mistake of Sheriff—Right of Sheriff to recover Money paid.*] If the assets in the hands of an officer of the Court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognize the rules of honesty as between man and man, and to act accordingly.—Previously to the presentation of a petition for the winding-up of a company, the sheriff was in possession of goods of the company which he had seized under writs of fi. fa. Subsequently to the presentation of the petition, the sheriff, in the honest belief that he was justified in so doing, seized the money paid at the doors of the company's theatre, and thereout paid the execution creditors, and his own costs, and handed a small sum to the provisional liquidator, who accepted the same. The sheriff afterwards gave up possession of the goods. A winding-up order was made, and on the application of the official liquidator the sheriff was ordered to refund the money seized by him (less the sum paid to the provisional liquidator) on the ground that the seizure was wrongful. The goods having been sold by the official liquidator:—*Held*, that the official liquidator must be ordered to pay out of the moneys received by him for the sale of the goods the amounts due to the sheriff for levy and charges on the writs, and the sheriff's costs of the application for such order. *Ex parte James* (Law Rep. 9 Ch. 609) and *Ex parte Simmonds* (16 Q. B. D. 308) considered and followed. *In re* OPERA, LIMITED - - - - 154

MORTGAGE—*Foreclosure—Deceased Mortgagor—Representative for the Action—Rules of Supreme Court*, 1883, *Order XVI., r.* 46.] The Defendant to a foreclosure action died insolvent before foreclosure absolute; there was no legal representative of his estate; an order was made in Chambers appointing one of his next of kin to represent his estate for the purposes of the action. The Court refused to make the foreclosure absolute in the absence of a properly constituted representative of the mortgagor. AYLWARD *v.* LEWIS - 81

2. —— *Foreclosure—Order Absolute—Direction for Delivery of Possession—Form of Order—Identification of Property—Writ of Possession—Rules of Supreme Court*, 1883, *Order XLVII., rr.* 1, 2—*Appendix H, Forms* 7*a*, 8.] An order for the delivery of possession of mortgaged property by the mortgagor to the mortgagee, forming part of a judgment for foreclosure absolute, ought to contain a description of the property as set forth in the mortgage deed, in order that the writ of possession may be filled up in such a way as to enable the sheriff to identify the property of which he is directed to deliver possession. THYNNE *v.* SARL - - - - 79

3. —— *Payment off by Supposed Owner of the Property—Effect as to Real Owner of a Share—Presumption as to Intention to keep Mortgage alive.*] Where a person who claims to be owner of an equity of redemption, but whose title to a share of the property is disputed in a pending action, pays off the mortgage and takes a reconveyance, the Court will presume an intention to keep the mortgage alive as against the share in dispute.—In 1813, hereditaments were mortgaged by A., and in 1850 the then owner devised them, subject to the mortgage, to his six children, including P. and S. P. acquired three of the six shares, and, in 1859, S. conveyed her share to P. In 1862, S. commenced a suit to set aside her conveyance. While the suit was pending, a deed was executed, which was on the face of it a reconveyance to P., in consideration of his paying off the balance due on the mortgage, of five-sixths of the mortgaged property, and a transfer of the mortgage so far as it affected the sixth part, which he had not attempted to purchase.—A decree was afterwards obtained in the suit setting aside the conveyance of the share of S.:—*Held*, that the mortgage was kept alive as against the share of S. *In re* PRIDE. SHACKELL *v.* COLNETT - - - - - 135

—— Redemption—Solicitor-mortgagee—Costs
See SOLICITOR 2. [363

—— Tenants in common—Redemption—Parties
See PRINCIPAL AND SURETY. [48

NEGLIGENCE—Amounting to fraud - 449
See COMPANY. 4.

NOISE—Temporary—Nuisance - - 409
See NUISANCE.

NUISANCE—*Noise—Water Company—Negligence—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 12.] The Defendants, in the exercise of their statutory powers, sunk a shaft in land adjacent to the Plaintiff's house, and for this purpose employed certain lift-pumps, the noise of which seriously interfered with the Plaintiff's comfort. The Plaintiff having commenced an action for nuisance the Defendants substituted centrifugal pumps, which diminished the noise of the pumping. When the sinking of the shaft was commenced, it became necessary to lower and lengthen the pumps from time to time, but at the date when the centrifugal pumps were substituted, the sinking of the shaft had arrived at a point at which this operation had ceased to be necessary. The Defendants might have used centrifugal pumps from the commencement, but they were less convenient on account of the difficulty of lowering and lengthening them, and on account of the increased labour attending

NUISANCE—*continued.*

their use, and they were not the pumps ordinarily used in sinking shafts:—*Held*, that the annoyance being temporary and for a lawful object did not amount to a nuisance at law.—*Held*, further, that the authority conferred on the Defendants to sink the shaft included all things reasonably necessary for the execution of the work.—*Fenwick* v. *East London Railway Company* (Law Rep. 20 Eq. 544) explained and distinguished. HARRISON *v.* SOUTHWARK AND VAUXHALL WATER COMPANY - - - - - - 409

ORDER TO TAX—Common order—Suppression of facts - - - - 102
See SOLICITOR. 1.

—— Common order—District Registrar—Jurisdiction - - - - 433
See PRACTICE. 2.

PARISH CLERK—*Office—Temporal or Spiritual.*] The office of parish clerk is a temporal office. LAWRENCE *v.* EDWARDS - - - - 72

PARTIES — Redemption action — Tenants in common - - - - 48
See PRINCIPAL AND SURETY.

—— Representative of deceased trustee - 349
See PRACTICE. 5.

—— Representative of deceased mortgagor 81
See MORTGAGE. 1.

PARTNERSHIP — *Partner engaging in another Business—Use of Name of Firm—Profits of the other Business claimed as Assets of the Partnership—Information gained as a Partner.*] If a member of a partnership firm avails himself of information obtained by him in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may obtain from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefit.—A member of a firm of shipbrokers styled "H. C. & Co.," assisted in the formation of a joint-stock company for building ships, and in so doing availed himself of information obtained as a member of the firm, and occasionally used the name and office paper of the firm in his correspondence on that subject. He received remuneration for his services in the formation of the company, and was made a director of the company, when formed, at a salary. He also threatened to engage in the separate business of a ship-owner under the style of "H. C. & Co., ship-owning." The other partners brought an action to restrain him from using the name of the firm in a separate business, and claiming an account of his profits and salary in connection with the new company:—*Held* (affirming the decision of Kekewich, J.), that the Defendant must be restrained from using the name of H. C. & Co.:—But, *held* (reversing the decision of Kekewich, J.), that as the business of the new company was beyond the scope of, and did not compete with, the partnership business, the Defendant was not bound to account for the benefit obtained by him in connection with the new company.—The use by the Defendant of the name and paper of H. C. & Co. in promoting the ship-building company was held not to be sufficient to show that as between the Defendant and his partners ship-building was within the scope of the partnership business.—*Dean* v. *MacDowell* (8 Ch. D. 345) explained and followed. AAS *v.* BENHAM [C. A. 244

—— Service on—Members out of jurisdiction 31
See PRACTICE. 4.

PATENT—*Agreement by Patentee to Assign—Action by Patentee for alleged Infringement—Subsequent Threats by Person entitled to Assignment—Injunction to restrain Threats—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 32, 46, 87.] A patentee agreed in writing, in July, 1890, to assign his patent to the L. Company. In November, 1890, the patentee commenced an action against the K. Company for alleged infringement. In February, 1891 (pending the patentee's action), the L. Company sent letters and circulars threatening customers of the K. Company with liability for an alleged infringement.—The K. Company then commenced an action under sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, against the L. Company for an injunction to restrain such threats:—*Held*, that the fact of the patentee's action being pending did not entitle the L. Company to the benefit of the proviso that the section "shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent"; and that the K. Company were entitled to an interlocutory injunction against the company. KENSINGTON AND KNIGHTSBRIDGE ELECTRIC LIGHTING COMPANY *v.* LANE FOX ELECTRICAL COMPANY - - 573

PETITION — Of course — District registries of Liverpool and Manchester - 433
See PRACTICE. 2.

—— Winding-up—Amendment - - 151
See COMPANY. 10.

PICTURE—Copyright - - - 371
See COPYRIGHT.

POSSESSION—Chattels—Trustee and cestui que trust—Title to sue - - 172
See AUCTIONEER.

—— Purchaser in - - - - 144
See VENDOR AND PURCHASER. 2.

—— Writ of—Foreclosure of mortgage - 79
See MORTGAGE. 2.

POWER—*General Power of Appointment—Exercise by General Devise—Power of Revocation and New Appointment—Wills Act* (1 *Vict. c.* 26), *s.* 27.] When a general power of appointment of real estate by deed or will has been completely exercised by deed, a power of revocation and new appointment being at the same time reserved, a general devise of real estate by the subsequent will of the donee of the power will not per se amount, by virtue of sect. 27 of the Wills Act, to an exercise of the power of revocation and new appointment.—*Pomfret* v. *Perring* (5 D. M. & G.

POWER—*continued.*

775) considered.—*Charles* v. *Burke* (43 Ch. D. 223 n.) followed. *In re* BRACE. WELCH *v.* COLT [671

2. —— *Release—Tenant for Life—Power to appoint among Children—Death of Child intestate—Release of Power by Tenant for Life—Right to Transfer of deceased Child's share—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.] A father, who was tenant for life under the trusts of his marriage settlement, had power to appoint the trust funds among the children of the marriage. In default of appointment the funds were to be held in trust for the children in equal shares, to be vested interests at twenty-one or marriage. The only issue of the marriage were three sons, one of whom died in early infancy. The other two sons attained twenty-one, and one of them died a bachelor and intestate after the death of his mother. Administration to his estate was granted to his father. The father then executed a deed by which he absolutely released his power of appointment, and he called on the sole surviving trustee of the settlement to transfer to him a moiety of the trust funds. The trustee declined to do so without the direction of the Court. The father issued an originating summons, by which he asked for an order declaring that, in the events which had happened, he was entitled to a moiety of the trust funds, and to have the same transferred to him:—*Held*, that, though the release was valid, the Court would not in any way assist the Plaintiff in obtaining a transfer of the fund. The summons was accordingly dismissed.—*Cunynghame* v. *Thurlow* (1 Russ. & My. 436, n.) followed. *In re* RADCLIFFE. RADCLIFFE *v.* BEWES - - - - - - 662

—— Execution—Renouncing executor - 261
See EXECUTOR.

—— To appoint new trustees - - 567
See TRUSTEE. 2.

PRACTICE—*Default in Appearance—Delivery of Amended Writ—Rules of Supreme Court*, 1883, *Order XIX., r.* 10; *Order XXVIII., r.* 10.] An amended writ may be delivered to a defendant who has made default in appearance, by filing it at the Central Office, personal service being unnecessary. *In re* HARTLEY. NUTTALL *v.* WHITTAKER - - - - - - - 121

2. —— *District Registrar—Liverpool and Manchester District Registries—Jurisdiction—Solicitor and Client—Bill of Costs—Petition of Course—Taxation—Rules of Supreme Court*, 1883, *Order XXXV., rr.* 6, 6*a*, *sub-r.* 2; *Order LXII., r.* 18—*Regulations of District Registry.*] A Registrar of the District Registry of Liverpool or Manchester has no jurisdiction to make a common order for taxation of a solicitor's bill of costs on an originating petition of course.—The decision of Kekewich, J., reversed. *In re* PORRETT - - C. A. 433

3. —— *Injunction—Mandatory Injunction—Erection of Buildings after Notice—Attempt to anticipate Injunction.*] The Defendant in an action to restrain him from building so as to darken the Plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men, and by working night and day ran up his wall to a height of nearly 40 feet before receiving notice that an ex parte interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, Stirling, J., restrained the Defendant from further building, and from permitting the wall which he had erected to remain:—*Held*, on appeal, that this order was right, as the Defendant had endeavoured to anticipate the action of the Court by hurrying on his building, and that what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action. DANIEL *v.* FERGUSON - C. A. 27

4. —— *Jurisdiction—Firm, of which some Members were resident Abroad—Amendment of Writ—Fresh Causes of Action—Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*g*)—*Service out of the Jurisdiction.*] The Plaintiffs, an English firm, entered into contracts in India with G. & Co., an Indian firm, for the manufacture of indigo. O. & Co. were the English correspondents of G. & Co., and there were some partners common to both firms, and some of the partners of each firm were resident in India. G. & Co. consigned indigo to O. & Co., and the Plaintiffs brought an action against the firm of O. & Co. claiming the indigo, to which all the members of O. & Co. both in England and India appeared. The Plaintiffs then obtained an order ex parte to amend their writ by adding G. & Co. as Defendants and making consequential alterations in the writ, and also obtained leave to serve the amended writ on the Defendants out of the jurisdiction. In making the amendments, the Plaintiffs made the firm of G. & Co. Defendants, and added a claim in respect of fresh causes of action arising out of breaches of contract by G. & Co. in India, which were not included in the original writ. The members of the firm of G. & Co. appeared to the amended writ, and moved to discharge the order to amend as irregular.—North, J., granted the application:—*Held*, that the original writ was wrongly issued against the firm of O. & Co., some of the partners being out of the jurisdiction, and that the order to amend it was also bad. The Court accordingly set aside the amended writ, and gave liberty to the Plaintiffs to amend the original writ by substituting for the name of the firm of O. & Co. the names of the individual members of that firm and of the firm of G. & Co. who were in this country, and by adding a claim in respect of breaches of the contracts; the members of the two firms who were out of the jurisdiction being at liberty to set aside their appearances; without prejudice to any application by the Plaintiffs to add such members as parties, and to serve them with the amended writ.—*Western National Bank of New York* v. *Perez* ([1891] 1 Q. B. 304), followed. INDIGO COMPANY *v.* OGILVY - - - C. A. 31

5. —— *Parties—Representative of Deceased Trustee or Executor—Orders of 26th August*, 1841, *Order XXXII.—Consolidated General Orders*, 1860, *Order VII., r.* 2—*Rules of Supreme Court*, 1883, *Order XVI., rr.* 6, 11, 48.] In an action for a general account against a surviving executor and trustee it is not, in the absence of special

PRACTICE—*continued.*

circumstances, necessary for the Plaintiff to make the representative of a deceased trustee or executor a party. If the Defendant requires such representative to be added, and the circumstances of the case render it advisable that he should be so added, the Rules of the Supreme Court, 1883, provide by Order XVI., rules 11 and 48, the machinery for that purpose. *In re* HARRISON. SMITH *v.* ALLEN - - - **349**

6. —— *Trial by Jury—Action in Chancery Division—Rules of Supreme Court*, 1883, *Order XXXVI., rr.* 6, 7.] A Plaintiff who had commenced an action in the Chancery Division for nuisance, applied for an order transferring it to the Queen's Bench Division, that it might be tried by a judge with a jury. North, J., before whom the case had been twice on motion for injunction, was of opinion that it had better be tried with a jury, and made the order. The Defendants appealed:—*Held*, that as North, J., had made the order after considering the circumstances of the case, the Court of Appeal ought not to interfere with the exercise of his discretion, there being no reason for expecting a failure of justice from the action being tried in the way he directed.—*Jenkins* v. *Bushby* ([1891] 1 Ch. 484) explained. MANGAN *v.* METROPOLITAN ELECTRIC SUPPLY COMPANY - - - **C. A. 551**

7. —— *Writ—Service out of Jurisdiction—Rules of Supreme Court*, 1883, *Order XI., r.* 1 (*f*), *r.* 2.] D. P., who was born in Scotland in 1831, was from the year 1856 to the time of his death in 1890 mostly resident in Bolivia. In 1882 he married the Plaintiff, a native of Bolivia. In 1886 he returned to Scotland, where he purchased an estate; and, in 1888, again returned to Bolivia. In May, 1890, he died in Bolivia, being then on his way to return to Scotland. The Plaintiff, claiming to be the wife of D. P., procured from the Bolivian Court, ex parte, a declaration of the deceased's intestacy, and that she was entitled to his moveables, including the moveable or personal property in England.—D. P.'s next of kin, who were his four sisters, claiming that at his death the intestate was domiciled in Scotland, obtained ex parte from the Court of Aberdeen a confirmation of their title, finding that the deceased died domiciled in Scotland, and appointing them executrices dative of the deceased; and pursuant to such decree, they delivered an inventory of the personal estate of the intestate in both England and Scotland, in accordance with the Confirmation and Probate Act, 1858, and found security for the administration of the intestate's personal estate, the greater part of which was in England, and consisted of a sum of £36,000 in the hands of G. & S., who had been D. P.'s agents, and were the holders of a power of attorney from the Plaintiff to prosecute actions here. The personalty in Scotland was of the value of £3000.—Pursuant to the above Act of 1858, the confirmation so obtained in Scotland was sealed by the Probate Court here, notwithstanding that a caveat had been entered on behalf of the Plaintiff, and the four sisters of the deceased thereby became the duly constituted legal personal representatives of the intestate in England. It was, however, intended to institute

PRACTICE—*continued.*

proceedings on the Plaintiff's behalf in Scotland for the revocation of the Scotch confirmation.—This action was commenced against the executrices dative and G. & S., and the Plaintiff claimed a declaration that the deceased died domiciled in Bolivia, administration, an injunction to restrain G. & S. from paying over the funds in their hands to the executrices, or otherwise parting with them except to the Plaintiff, an injunction to restrain the executrices from taking proceedings to recover, and from receiving the intestate's personal estate, and a receiver.—The writ was duly served on G. & S. in London, and the Plaintiff had, under Order XI., r. 1 (*f*), obtained an order for service of the writ out of the jurisdiction on the executrices:—*Held*, on motion by the executrices to discharge the order for service, that, although the Court would on a motion supported by proper evidence be justified in granting an injunction to restrain the executrices from suing G. & S. within the jurisdiction, as such an injunction would be an injunction to restrain a thing being done within the jurisdiction, and consequently within rule 1 (*f*) of Order XI., yet, under all the circumstances of the case, and particularly as the Scotch Courts had already to some extent seisin of the case, and the Plaintiff intended to institute further proceedings in Scotland, the order for service ought not to stand and must be discharged.—A remedy which depends on the will and pleasure of another person is not a concurrent remedy within rule 2 of Order XI. *In re* DE PENNY. DE PENNY *v.* CHRISTIE - - - - **63**

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PRINCIPAL AND SURETY—*Giving of Time—Covenant to pay Mortgage Debt—Covenant in Consolidation Deed to pay at later Date—Discharge of Property as well as Personal Liability of Surety—Tenants in Common—Redemption Action—Parties.*] Where a surety pledges his personal credit by bond or covenant, and by the same contract pledges also his goods, or mortgages or charges his lands, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the back of the surety—e.g., by a consolidation deed, with a fresh covenant for payment of the principal sum with other moneys subsequently advanced at a later

PRINCIPAL AND SURETY—*continued.*
date—not only discharges the surety from all personal liability (see *Bolton* v. *Buckenham* ([1891] 1 Q. B. 278)), but also releases the property which the surety had included in the contract.—*Wheatley* v. *Baslow* (7 D. M. & G. 261), *Hodgson* v. *Hodgson* (2 Keen, 704), and *Holme* v. *Brunskill* (3 Q. B. D. 495) discussed,—Parties necessary to a redemption action by mortgagees of the interests of tenants in common, whether of an undivided share or of the entirety, stated. BOLTON v. SALMON - - - - - 48
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SETTLEMENT — *Husband and Wife — Wife's Equity to a Settlement—Rights of Assignee of the Fund—Special Circumstances—Conduct of Wife—Acknowledgment by Wife before Commissioners—20 & 21 Vict. c. 57.*] Reversionary interests belonging to a married woman were assigned by her and her husband to a purchaser, and the married woman had the benefit of the purchase-money. The deed was acknowledged by her according to the provisions of the 20 & 21 Vict. c. 57, but was inoperative to bind her, as the reversionary interests were derived under wills made before the 31st of December, 1857. The reversionary interests fell into possession simultaneously during the life of both husband and wife. With respect to one of them, which was a sum of about £500, it was received by the husband and wife and expended in the maintenance of the family. The other fund was represented by a sum of about £500 in Court. The family were in necessitous circumstances, the husband being out of work and the family being mainly dependent on the earnings of the wife. The wife claimed her equity to a settlement as against the assignee of the fund:—*Held* (reversing the decision of Kekewich, J., who settled the whole fund), that, although the assignment was nugatory, the Court would take into consideration the fact that she had joined in the assignment to the purchaser and had acknowledged the deed before the Commissioners, and also her subsequent conduct in assisting her husband to obtain the first sum of £500, as raising an equity against her. But, the assignee waiving his claim to half the fund in Court, the Court settled that on the wife and her children. ROBERTS v. COOPER - - - C. A. 335

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SOLICITOR—*Bill of Costs—Taxation—Common Order—Order obtained by Suppression of material Facts—Order become Inoperative by Effluxion of Time—Right to obtain Second Order of Course—6 & 7 Vict. c. 73, s. 37.*] When a client has obtained the common order to tax his solicitor's bill, if he allows the time thereby limited for the making of the certificate to elapse without taking any proceedings under the order, he is not entitled to obtain a second order of course, suppressing the fact that he has obtained the first order.—On the 27th of June a client commenced an action in the Queen's Bench Division against his solicitor, claiming £75 as money received by the solicitor for his use. On the 1st of July the solicitor delivered his bill of costs to the client. On the 17th of July the solicitor delivered his defence in the action, claiming to set off against the client's demand professional charges to the amount of £90, and some other items amounting to £31, in respect of which he claimed indemnity from the client. On the 30th of July issue was joined in the action. On the 1st of October the client (suppressing the existence of the action) obtained ex parte in the Chancery Division the common order to tax the solicitor's bill. The order was not served on the solicitor till the 29th of October, and no proceedings were taken under it before it became inoperative by reason of the expiration of the month thereby limited for the making of the Taxing Master's certificate. On the 11th of February (the action not having been yet tried), the client (suppressing the existence of the action and the making of the former order to tax) obtained ex parte in the Chancery Division a second common order to tax the solicitor's bill. Upon a motion by the solicitor to discharge this order for irregularity:—*Held*, that the second order had been obtained irregularly, and by means of the suppression of material facts, and that the client must pay the costs of the motion to discharge it:—*Held*, however, that the order should not be discharged entirely; but that it should be left standing with the omission of the latter part, which directed the payment of what should be found due on the taxation; and that the payment of this sum, as well as of the solicitor's costs of the motion, should be left to be dealt with by the Judge in the action. *In re* WEBSTER - 102

SOLICITOR—*continued.*

2. —— *Bill of Costs—Taxation after Payment—Special circumstances—6 & 7 Vict. c. 73, ss. 38, 41.*] There is no rigid rule as to what kind of circumstances will justify the taxation of a solicitor's bill after payment, but the judge has in each case to determine whether there are special circumstances which make it right to refer the bill for taxation, and if there are special circumstances in the case, the Court of Appeal will not readily interfere with the decision of the Court below that they are sufficient to justify taxation *In re* CHEESMAN - - - C. A. 289

3. —— *Costs—Taxation—Redemption Action — Solicitor-Mortgagee.*] A solicitor-mortgagee acting as solicitor for himself in a redemption action is entitled to costs out of pocket, but not to remuneration for personal trouble. The objection to the allowance to a defendant solicitor-mortgagee of profit costs need not be taken at the hearing, but may be taken before the Taxing Master after judgment in the usual form containing the common order for taxation of costs has been given in a mortgagor's redemption action.—*Cradock v. Piper* (1 Mac. & G. 664) followed.—*Price v. M'Beth* (33 L. J. (Ch.) 460; 10 Jur. (N.S.) 579; 12 W. R. 818) not followed. STONE *v.* LICKORISH - 363

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TRADE-MARK—*Registration—Alteration of Register by omitting Words "Trade Mark"—Terms on which Leave granted—Patents, Designs, and Trade Marks Acts*, 1883 *and* 1888 (46 & 47 *Vict. c.* 57, *ss.* 64, 74, 92; 51 & 52 *Vict. c.* 50, *s.* 10).] Labels registered as trade-marks under the Patents, Designs, and Trade Marks Act, 1883, contained with other matter the words "trade mark," so placed as to appear to refer specially to some device on the mark, as, for instance, in one case to a bull's head. In consequence of the observations of Fry, L.J., in *In re Apollinaris Company's Trade-marks* (*Ante*, p. 186), the owners of the marks applied for leave to alter the registration by striking out the words "trade mark": —*Held*, that, as a condition of granting the application, the Court ought to impose upon the applicants terms in accordance with the provisions of the Patents, Designs, and Trade Marks Act, 1888, s. 10, namely, that the applicants should undertake to indorse on their application, and enter on the register, a statement of the essential particulars of each mark, and a disclaimer of the exclusive right to the added matter (if any), to the satisfaction of the Comptroller. *In re* COLMAN'S TRADE-MARKS - - - 402

2. —— *Registration — Old Mark—Original Fraudulent User—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 74, *sub-s.* 1.] A cigar merchant applied to register as new marks certain labels to be applied to tobacco, whether manufactured or unmanufactured.—Previous to the year 1887 he had used the marks on boxes of cigars in combination with the word "Habana," though the cigars were in fact of Mexican growth and manufacture. The labels also contained words implying that he was the successor in business of a certain firm of M. & Co., which he was not. The marks for the registration of which application was now made, omitted the word "Habana," and, substituting the true place of origin of his cigars, had his own name on the boxes, without any false addition as to previous businesses:—*Held*, that the original fraudulent user of the marks disentitled the applicant to have them registered as new marks, even though the dishonest portions were omitted,

TRADE-MARK—*continued.*

for to permit registration would in effect be enabling the Applicant to benefit by his former fraudulent conduct. *In re* FUENTE'S TRADE-MARKS - - - - - - - **166**

3. —— *Registration—Old Mark—"Special and Distinctive Word"—"User"—Combination with other Marks—Separation of Marks—Composite Mark—Trade Marks Registration Act,* 1875 (38 & 39 *Vict. c.* 91), *s.* 10—*Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57)—*Patents, Designs, and Trade Marks Act,* 1888 (51 & 52 *Vict. c.* 50), *s.* 10.] In 1882, Heidsieck & Co., a French firm of champagne growers, registered, under the Trade Marks Registration Act, 1875, the words "Monopole" and "Dry Monopole," as separate trade-marks for separate kinds of champagne, on the ground of user of those marks before the Act; but they never had, in fact, used those words alone as marks; for upon the labels, wrappers, corks, and cases for their bottles they had always used them in conjunction with the name of the firm, "Heidsieck & Co.," which they also registered by itself in 1882 as a trade-mark under the Act; and upon the corks and cases there were, besides, various devices which had been registered as trade-marks under the Act. On the cases, "Monopole," or "Dry Monopole," appeared on one side alone, while on another side was "Heidsieck & Co." alone, and on one of the ends was one of the firm's registered devices alone. The firm sold other brands of champagne under distinctive registered labels, bearing the name of the particular brand, and always the name of the firm underneath.—Upon a motion under the Act of 1875, and the Patents, Designs, and Trade Marks Acts, 1883 and 1888, to expunge "Monopole" and "Dry Monopole" from the register of trade-marks:—*Held*, by Kay, J., and by the Court of Appeal, that those words had not been so "used as trade-marks before the passing of the Act," within the meaning of sect. 10 of the Act of 1875, as to entitle Heidsieck & Co. to have them registered; and they were accordingly ordered to be expunged from the register.—What is "user as a trade-mark" under sect. 10 of the Act of 1875, explained.—*In re Spencer's Trade-marks* (3 Rep. Pat. Cas. 73) discussed. RICHARDS *v.* BUTCHER [C. A. **522**

4. —— *Registration—"Person Aggrieved"—Importer—Foreign Producer—Natural Products—"Distinctive Trade-mark"—Part of Label pointed out as "Trade-mark"—Disclaimer of Words in Label—"Fancy Words"—"Geographical Name"—Name of Mineral Spring—"Place of Business"—"Common to the Trade"—Time for Disclaimer—Trade Marks Registration Act,* 1875 (38 & 39 *Vict. c.* 91), *ss.* 5, 10—*Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 90—*Amendment of Act while Application pending.*] The intention of the Trade Marks Registration Act, 1875, s. 5, and the Patents, Designs, and Trades Marks Acts, 1883, s. 90, in requiring an applicant for rectification of the register of trade-marks to be a "person aggrieved," is only to prevent the interference of common informers, or of persons actuated by merely sentimental notions, and not to require

TRADE-MARK—*continued.*

evidence of serious damage.—Any person who is in the same trade as the person who has wrongfully registered a trade-mark, and who desires to deal in goods covered by the wrongful registration, is primâ facie a person aggrieved.—Whenever one trader, by the wrongful registration of a trade-mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of the trade into which he desires to enter, that rival is a "person aggrieved."—Although the effect produced, or likely to be produced, by the wrongful registration is not the exclusion, but only the hampering of the rival trader, the rival trader is a "person aggrieved."—Whenever one trader uses the fact of his having a trade-mark already on the register as any part of his case against another trader in any legal proceedings, e.g., for the purpose of supporting an application for the registration of another trade-mark, which the second trader is opposing, the second trader is a "person aggrieved," and none the less because he may have other means of defending himself.—A trade-mark must at the date of registration distinguish the goods of the trader registering it from all others.—An importer of foreign goods cannot register as his own the trade-mark of the foreign producer, whether the goods are produced by a course of manufacture or by a process of nature; nor whether the importer has or has not an exclusive contract for this country; nor whether the producer does or does not conse to the registration.—Whether an importer c or cannot register as his own the produce trade-marks after the importer has acquired t control of the producer's entire output (as which, *quære*), the registration by the impor in his own name, while only having a le right, of trade-marks belonging to the produ cannot be rendered valid by the subsequen quisition by the importer of the right to whole output.—Although in the case of a trade-mark it will ordinarily be presumed th mark tendered for registration is intended t used, yet, if it is proved that a mark which sought to register, without prior user, is intended to be used by the applicant, but tha is an importer of foreign goods and is seeking to register the mark for the purpos excluding from the English market similar go intended for foreign consumption, and having mark affixed to them by the foreign produc whose mark it is, registration ought not to allowed.—Where a label tendered for registrat contains, with other matter, a device to wh special attention is directed as being the "tra mark," registration ought to be refused, on ground that the effect of the label is likely be to mislead the public into the belief that device alone is protected or claimed.—Wo contained in a distinctive label registered a whole under the Patents, Designs, and Tra Marks Act, 1883, need not be disclaimed und sect. 74 of that Act, inasmuch as they form part of the label, and are not additions to it. Where a trade-mark has been wrongfully reg tered, and an application to remove it from t register is made by a person aggrieved, the ma

ADE-MARK—*continued.*

will not be allowed to remain on the register, on the ground that if it were removed it could (by reason of some intervening events) be immediately re-registered on a new application, inasmuch as an opportunity must be given to the public, by the insertion of the usual advertisements, to come in and oppose the new application.—The names of well-known mineral-water springs, such as "Apollinaris," "Hunyadi Janos," "Friedrichshall," are geographical and are not "fancy words not in common use" within sect. 64 of the Act of 1883, nor "invented words" or "words having no reference to the character or quality of the goods, and not being a geographical name" within the same section, as amended by the Act of 1888, whether sought to be registered in respect of the waters of the springs or of products of those waters.—*Per* Kekewich, J.: The names of foreign springs, when added to a trade-mark tendered for registration under the Act of 1888, by a limited company with a registered office in England, are not protected against the requirement of a disclaimer under sects. 64, 74, of that Act, by the exception contained in those sections in favour of a "place of business."—*Per* Kekewich, J.: Where an application for the registration of a trade-mark was made while the Act of 1883 was in force, but being opposed, was not heard until after the amending Act of 1888 had come into force, the applicants were *held* to be entitled to avail themselves of whichever of the two Acts was the more favourable to their application.—*Per* Kekewich, J.: "Common to the trade" in sect. 74 of the Acts of 1883–8, means "open to the trade," and not "in common use in the trade."—*Per* Kekewich, J.: "When a disclaimer is required by sect. 64 of the Act of 1888, or by sect. 74 of the Acts of 1883–8, such disclaimer must be made in the application for registration, and cannot be made afterwards." *In re* APOLLINARIS COMPANY'S TRADE-MARKS [C. A. 186

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UST—For sale—New trustees—Exercise of power by heir - - - 567
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RUSTEE—*Administration Action—Jurisdiction Personal Profit.*] Under an order made on rther consideration of an administration action, sts were paid to solicitors. The solicitors paid er half the profit costs to a defendant, a trustee the estate being administered:—*Held*, that ere was no jurisdiction on summons in the tion to order the Defendant trustee to pay into urt the amount so paid to him. *In re* THORPE. IPONT *v.* RADCLIFFE - - - 360

2. —— *Trust for Sale—Power to appoint new rustees—Exercise by Heir—"Acting Trustee"—Bare Trustee"—Land Transfer Act*, 1875 8 & 39 *Vict.* c. 87), *s.* 48.] By a deed executed 1836, real estate was vested in W. D. and

TRUSTEE—*continued.*

T. P. in fee, upon trust that they "or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee for the time being," should sell the same. The deed provided that if any of the trustees thereby appointed should die, it should be lawful for "the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee," to appoint new trustees.—T. P., who survived W. D., died intestate in 1855, leaving T. H. P. his heir.—T. H. P. died intestate in 1857, leaving T. S. H. P. his heir.—T. S. H. P. died intestate in 1876 (and therefore after the coming into operation of the Land Transfer Act, 1875), leaving three daughters, A., B., and C., his co-heiresses.—A., B., and C. never received the rents, or otherwise acted in the trusts, till 1890, when they executed a deed purporting to appoint X., Y., and Z. new trustees, and to vest the trust estate in them.—X., Y., and Z. contracted to sell part of the trust estate:—*Held*, on the authority of *In re Morton and Hallett* (15 Ch. D. 143), that A., B., and C. could have executed the trust for sale, and that they were "the trustees for the time being":—*Held*, also, that having acted when called upon to do so, by appointing new trustees, A., B., and C. were "acting trustees"; and that X., Y., and Z. could make a good title:—*Held*, also, that T. S. H. P. was not a "bare trustee" within sect. 48 of the Land Transfer Act, 1875, and that the legal estate passed to A., B., and C.—The definition of a "bare trustee" stated by Hall, V.C., in *Christie v. Ovington* (1 Ch. D. 279), preferred to that stated by Jessel, M.R., in *Morgan v. Swansea Urban Sanitary Authority* (9 Ch. D. 582). *In re* CUNNINGHAM AND FRAYLING - - 567

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VENDOR AND PURCHASER—*Objections to Title—Condition limiting Title to less than Forty Years—Objection to Anterior Title discovered by Purchaser before Completion—Delay in giving Notice to Vendor.*] Property was put up for sale by auction on the 11th of June, 1890. The particulars described the property as "freehold." The conditions of sale provided that the title should commence with a mortgage dated the 29th of July, 1852, and that the purchaser should, within fourteen days after the delivery of the abstract, send to the vendor's solicitors all his objections and requisitions as to the title, and that subject thereto, the title should be deemed to be accepted.—An abstract of title, commencing with the mortgage of the 29th of July, 1852, was delivered to the purchaser on the 24th of June, 1890. On the 8th of July the purchaser sent various objections and requisitions to the vendor's solicitors. He was not satisfied with

VENDOR AND PURCHASER—*continued.*

the vendor's replies, and on the 23rd of July he delivered further requisitions. On the 9th of August he issued a summons under the Vendor and Purchaser Act, asking for a declaration that his requisitions and objections had not been satisfactorily answered by the vendor, and that a good title had not been shewn in accordance with the particulars and conditions of sale. On the 16th of October the purchaser filed an affidavit in support of his summons, in which he raised as an objection to the title the existence in a deed of the 3rd of March, 1847, through which the title to part of the property was traced, of a covenant restricting the right of building on that part. The purchaser had discovered the contents of this deed by means of inquiries which he had made of a third party with reference to another matter; but the objection was not mentioned to the vendor until the affidavit of the 16th of October was filed. The Court was of opinion that the purchaser must be deemed to have acquired notice of the covenant shortly before the 23rd of July:—*Held*, that the purchaser having acquired notice of the restrictive covenant, would be bound by it; that it formed a valid objection to the title; that he was not too late in raising the objection; and that he was entitled to be relieved from his contract.—*Semble*, that, as the purchaser had agreed to accept a title of less than forty years, he would, even if he had not discovered the covenant, have had constructive notice of it, since it would have been disclosed by the abstract, if a proper forty years' title had been shewn. *In re* COX & NEVE'S CONTRACT 109

2. —— *Purchaser in possession—Specific Performance—Acceptance of Title—Objection to Title—Purchase-money—Payment into Court—Option to give up Possession—Security for Purchase-money.*] Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase-money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the Court will not, on a motion by the vendor in an action for specific performance, order him to pay the balance of purchase-money into Court without giving him the option either of retiring from possession on a certain day or of paying the balance into Court on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract and has made no objection to the vendor's title; but that option will not be given if the purchaser has done anything to prejudice the value of the property as a security for the balance. GREENWOOD *v.* TURNER - - 144

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VOLUNTARY SETTLEMENT—*Sale by Trustees—Title—Possible Bankruptcy of Settlor—Avoidance of Settlement—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—27 *Eliz. c.* 4.] Purchasers from the trustees of a voluntary settlement of freehold lands objected to the title on the ground that under sect. 47 of the Bankruptcy Act, 1883, the settlement would be void as against the trustee in bankruptcy of the settlor, if he should become bankrupt within two years of the date of the settlement, and would be void if he should become bankrupt within ten years of such date, unless the "parties claiming under the settlement" could shew that the settlor was at the time of making the settlement able to pay all his debts without the aid of the settled property.—Upon a vendor's summons under the Vendor and Purchaser Act, 1874.—*Held*, that the purchasers would be "parties claiming under the settlement," and that the title could not be forced upon the purchasers:—*Held*, also, that although a good title might possibly be made through the concurrence of the settlor, by his conveying to the purchasers and their paying the purchase-money by his direction to the trustees, yet such a title could not be forced upon unwilling purchasers; first, because the Court would not assist a settlor to get rid of his own settlement; and, secondly, because there was no means of ascertaining conclusively that the settlement was not in reality in the first instance, or had not subsequently become, a settlement for value. *In re* BRIGGS & SPICER - - - - - - 127

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WILL—*Construction—"Contents of Desk"—Choses in Action—Key of a Strong Box—Intention of Testator.*] A testator gave his desk "with the contents thereof" to his nephew J.; he also gave him a legacy of £200, and made him one of his executors and residuary legatees; the desk contained bank notes and coin, a banker's deposit receipt, a cheque to the order of the testator, but unindorsed, divers promissory notes, payable to the testator or order, also unindorsed, a promissory note payable on demand, and the key of a tin box in which some securities were kept. It was admitted that the bank notes and coin passed to the nephew J., but the residuary legatees contended that the choses in action did not pass:—*Held*, that by the desk and its "contents" the testator intended to pass all that was found therein at the time of his death, and that the words used were sufficient to pass all the choses in action, including those which were negotiable only after indorsement by the executors:—*Held*, also, that the key of the security box gave no title to the contents of that box.—*Roberts* v. *Kuffin* (2 Atk. 112) discussed and distinguished.—Effect of *In re Prater* (37 Ch. D. 481) on the older authorities stated. *In re* ROBSON. ROBSON *v.* HAMILTON - - - - - - 559

2. —— *Construction—Gift of Income of Fund during Life or Widowhood—Gift of Legacies out of Fund after Widow's Death.*] A testator directed his trustees to pay the income of a trust fund to his wife during her life, or, until she should marry again; and from and after her marrying again he directed his trustees to pay her an annuity of £2000 during her life; and from and after the death of his wife he directed them to levy and pay certain legacies thereinafter bequeathed, all which, although payment was postponed until after the decease of his said wife, he directed to

WILL—*continued.*

be taken as vested immediately upon his own decease. And the testator gave £5000 to his trustees to be divided among such charitable institutions as his wife should by her will name and appoint; and gave his residuary estate to three persons in equal shares. The testator's wife survived him, and married again:—*Held* (reversing the decision of North, J.), on this point, that there being no ambiguity in the words of the gift, and no doubt appearing on the will as to the intention of the testator, all the legacies directed to be paid at the death of the widow were to be postponed till that event happened, and were not payable on the determination of her life estate by her second marriage. The principle of construction established by *Jones* v. *Westcomb* (1 Eq. C. Ab. 245) held not applicable. *In re* TREDWELL. JEFFRAY *v.* TREDWELL C. A. 640

3. —— *Satisfaction—Bequest of Shares in a Partnership Business—Purchaser for Value—Double Portions.*] A testator by his will gave his shares in a partnership business to his three sons equally as tenants in common. At the date of his will he had twenty-one twenty-fourth shares in the business, and E., one of his said sons, was employed in the business as a manager, at a salary; the other two sons were not employed in the business. Subsequently, E. pressed for an increase of his salary, and eventually the testator arranged a new deed of partnership under which E. was admitted a partner, the testator making over to him two of his twenty-one shares, and E. accepted the position and relinquished his salary as manager, but received instead his proportion of the profits as a partner, which was greater in amount.—On the death of the testator, E. claimed to be a purchaser for value of his two shares in the partnership, and to be entitled to shares equally with his brothers in the remaining nineteen shares of the testator:—*Held*, that, assuming that the two shares which E. received in the testator's lifetime were given him by way of portion, the presumption against double portions

WILL—*continued.*

was rebutted by the circumstances under which he received them, which shewed that the testator intended him to have a greater share in the business than his brothers.—But, *semble*, the two shares were not intended as a portion, but as remuneration for his services as manager.—The decision of Romer, J., reversed. *In re* LACON. LACON *v.* LACON - - - C A. 482

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